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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 522

THE UNITED STATES DISTRICT FOR THE WESTERN DISTRICT OF OKLAHOMA AND THE HONORABLE STEPHEN S. CHANDLER, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, *Petitioners*,

v.

OTTO G. LUTES, FLORENCE LUTES, B. B. FRENCH, JEWELL FRENCH, L. O. HOOD, MYRTLE HOOD, D. M. BROWER, MILDRED BROWER, CARL R. STALCUP, MILLIE L. STALCUP, IDA F. WRAY, E. F. BRUCE, GERALDINE BRUCE, J. J. FRENCH, THESIA FRENCH, RIFFE WESLEY, HAZEL RIFFE, OSTBY S. AUSTIN, ETHEL AUSTIN, JESSIE E. BROWN, D. L. HAMILTON, HELEN HAMILTON, HARRY G. RIFFE, MYRTLE RIFFE, G. F. PRICE, FLORA LEE PRICE, LEWIS B. CARPENTER, MARY E. CARPENTER, E. L. CARPENTER AND BLANCHE M. CARPENTER, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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STATUTE:

28 U.S.C. § 1254(1) 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It is printed herein, Appendix A, page 1a. The stay order of the District Court of Oklahoma for the Western District of Oklahoma is also unreported, and is printed at Appendix B, page 9a. The journal

entry of judgment by the Oklahoma District Court for Texas County in Westhoma v. Rist, is printed at page 13a of the appendix. Its journal entry of judgment in Peerless Oil Co. v. Carpenter is printed at page 16a in the appendix. The opinion of the Court of Appeals for the Tenth Circuit, denying a motion to modify its earlier opinion, is found at page 21a of the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was filed on August 2, 1962.

Jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether a Federal district judge abuses his discretion by invoking the abstention doctrine to stay proceedings in a diversity action involving private litigants and local real property rights where: (a) the identical controlling substantive issues, involving unsettled state law, are pending in the supreme court of the forum state, and (b) the definitive resolution of the law can be anticipated within a reasonable time.[1]

STATUTES INVOLVED

There are no statutes, either Federal or State, which are pertinent to the substantive issue of this case.

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[1] At the time the Federal District Judge exercised his discretion, there were pending in the District Court of Texas County, Oklahoma, four cases, two of which had been argued and were *sub judice*. On the date the present petition was filed, the Oklahoma Supreme Court had docketed two of the state court decisions in question. The other two had by stipulation been stayed pending the outcome of appellate litigation.

STATEMENT OF THE CASE

Nineteen suits were consolidated in the United States District Court for the Western District of Oklahoma; the first having been filed August 30, 1961. All suits were brought by lessors against lessees, the latter holding under a leasehold instrument covering Oklahoma realty and the plaintiffs seeking a judicial determination that interests of lessees thereunder to certain oil property lying below sea level had expired by the express terms of the lease. The judicial basis of the suits was diversity of citizenship. The precise constructional question in each case was the proper interpretation of a "Pugh" clause (App. E) contained in the leases, in light of a consolidation and unitization of certain properties covered by the lease. All of the cases involved leases and factual circumstances substantially identical to those in *Rogers* v. *Westhoma*, 291 F. 2d 726 (10th Cir. 1961) involving Kansas land and law, in which the Court of Appeals had earlier held in favor of the lessors.

Shortly thereafter, Westhoma Oil Corporation, one of the defendants in the instant cases, filed two quiet title actions in the Oklahoma District Court for Texas County. Westhoma there sought a determination that, as to other lands and parties, the same kind of lease form as involved in the Federal District Court cases had not expired as to premises located below sea level. (See Appendix E for a summary and history of pending state court actions). On September 25, 1961, Westhoma filed a motion in the Federal District Court requesting a stay of proceedings therein until the state court had decided the dispositive issues. The motion was denied October 18, 1961.

Later, Westhoma filed two more actions in the same state court (See Appendix E), both involving the same constructional issue as in the Federal court case, and one involving the same land, the same lease, and the same parties as in the Federal action.

On motion, the District Judge for the Western District of Oklahoma granted a stay order in the nineteen consolidated cases on March 28, 1962. From this order certain plaintiffs filed a petition for a writ of mandamus in the Court of Appeals for the 10th Circuit on May 16, 1962, asking it to vacate the stay order. On June 13, 1962, the Oklahoma District Court for Texas County decided the first two state actions described above in favor of Westhoma.[2] (App. C, Attachs. 1 and 2 and App. E).

On August 2, 1962, the Court of Appeals for the 10th Circuit issued a mandamus, vacating the stay order and requiring the District Judge below to hear and decide the pending litigation. (App. A). The Court of Appeals has stayed the issuance of its mandate until October 15, conditioned on filing of a petition for certiorari, which will operate to continue such stay pending final disposition by this Court.

On August 30, 1962, Westhoma filed a motion requesting the Court of Appeals to modify one paragraph of its opinion. (App. C). The motion asserted, among

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[2] The second pair of state court actions are not yet tried. By a stipulation between opposing counsel, it is agreed that these cases shall await the outcome of the other state and Federal litigation. If the Federal action involving the same parties, same lease, and same land as one of the untried state actions is finally decided by an unappealable judgment *before* the first two state court cases are finally decided by a state court of last resort, the prior Federal decision, according to the stipulation, is to be controlling.

other things, that the "sole issue" in the outstanding state court cases was the "precise question of law which was decided in *Rogers* v. *Westhoma* and is decisively involved in the Federal court cases pending below." To the motion were attached copies of journal entries of judgment in the two decided state court cases, *Westhoma Oil Co.* v. *B. C. Rist,* No. 10,596, and *Peerless Oil & Gas Co.* v. *Carpenter,* No. 10,597 (App. C). The Court of Appeals denied this motion in a per curiam opinion filed on September 11, 1962.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the Tenth Circuit, in vacating the stay order below, did not act in harmony with applicable decisions of this Court. The instant case raises questions of intrinsic significance concerning the proper application of the abstention doctrine. The opinion below involved serious misconceptions of previous judicial teachings on this point. See, *e.g.*, *Alabama Public Service Comm.* v. *Southern Ry.*, 341 U.S. 341, 350-351 (1951); *Texas R.R. Comm.* v. *Pullman Co.*, 312 U.S. 496, 500-501 (1941).

2. The decision of the Court of Appeals for the Tenth Circuit is at odds with the express pronouncements of the Supreme Court in *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478 (1940), and *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25 (1959).

3. The Court of Appeals for the Tenth Circuit failed to address itself to the precise issues before it on review, *i.e.*, the soundness of the equitable discretion exercised by the trial court.

4. There is a conflict in principle between the Tenth Circuit's review of a trial court's use of the abstention

doctrine and that followed in other circuits. On this point, the differences in tone and policy are especially marked in *Mottolese* v. *Kaufman*, 176 F. 2d 301 (2d Cir. 1949), and *Beiersdorf & Co.* v. *McGohey*, 187 F. 2d 14 (2d Cir. 1951).

5. The Court of Appeals for the Tenth Circuit ignored the strong Federal policy favoring uniformity of decision in diversity cases and the avoidance of intrusion by the Federal judiciary into matters within the special competence of the states.

6. In vacating the stay order and requiring immediate adjudication on the merits by the federal district court, the Court of Appeals for the 10th Circuit lost sight of the doctrine of *Brillhart* v. *Excess Ins. Co. of America*, 316 U.S. 491 (1942).

SUMMARY OF ARGUMENT

The facts of the instant case, petitioner submits, amply justify the discretionary use of the abstention doctrine made by the district court below. This is true simply as a matter of precedent, the reasons for abstention here being indistinguishable from those in *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478 (1940). Further, the 10th Circuit failed to come to grips with the essential question of discretion that it should have reviewed. It improperly assumed that the stay order could be sustained only on the basis of some particular type of exceptional circumstance enumerated in *Meredith* v. *Winter Haven*, 320 U.S. 228 (1943). Such doctrinaire rigidity is unsound in principle, since it was an act of *discretion* under review, and unsound on the basis of precedents. See, *e.g. U.S.* v. *150.29 Acres*, 135 F. 2d 878 (7th Cir. 1943); *Findlay* v. *Odland*, 127 F. 2d 948 (6th Cir. 1942);

Prudential Ins. Co. v. *Zimmerer*, 66 F. Supp. 492 (D. Neb. 1946).

The 10th Circuit also ignored the strong Federal policy favoring uniform decisions in diversity cases, a policy ably expressed in such cases as *Klaxon Co.* v. *Stentor Co.*, 314 U.S. 487 (1941), *Phillips Petroleum Corp.* v. *Cabot Carbon Co.*, 348 U.S. 867 (1954), and *Clay* v. *Sun River Mining Co.*, 302 F. 2d 599 (10th Cir. 1962), and of particular importance in land cases, *Humble Oil Co.* v. *Sun Oil Co.*, 190 F. 2d 191 (5th Cir. 1951).

Finally, even if the 10th Circuit were fairly persuaded that the district court had abused its discretion, the remedy imposed by the 10th Circuit was inconsistent with *Brillhart* v. *Excess Ins. Co. of America*, *supra*. There, this court made it clear that, in such circumstances as present here, the district court should have been allowed a chance to articulate fully its reasons for granting the stay rather than being forced into an immediate adjudication on the merits.

ARGUMENT

Normally, a federal district court must assert its jurisdiction when this jurisdiction is lawfully invoked. However, as this Court is well aware, there is a class of cases in which a federal district court may properly decline to assert jurisdiction, or at least stay proceedings, while awaiting a definitive adjudication of controlling state law by a state tribunal. The precise limits of this class are not subject to mathematical delineation. But it is true beyond question that the "abstention doctrine," enunciated by this Court and its subordinate federal tribunals, recognizes an area of sound judicial discretion in which a court may quite properly stay its hand, and that within this

discretionary area a trial judge's decision should be affirmed.

Typically, cases falling this class as ripe for a non-assertion of jurisdiction—at least under the Supreme Court's imprimatur—are those in which a potential Constitutional question may thereby be avoided, *Texas R.R. Comm.* v. *Pullman Co.*, 312 U.S 496 (1941), or those involving a basic problem of state policy beyond the special competence of the federal judiciary, *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943) or those in which there is some significant countervailing interest in favor of absetention, *Meredith* v. *Winter Haven, supra.*

Among the several Supreme Court decisions the one most nearly dispositive of the present case is *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478 (1940). Accordingly, it is worth analyzing in detail.

In *Magnolia* the trustee of a railroad in reorganization under the Bankruptcy Act petitioned the district court, sitting in bankruptcy, for a determination of title to oil lying below right-of-way lands held by the railroad in question. Asserting both adverse possession and certain instruments of conveyance, the trustee contended that he had title in fee simple both to the land and underlying oil deposits. Finding the trustee in actual possession of the oil property, the court held it had summary jurisdiction to decide the title issue. As to this the Supreme Court upheld the district court. The Supreme Court also held, however, that this jurisdiction was improperly asserted to decide the title issue. The reason assigned by the Supreme Court was simply that the "[D]ecision with which the Federal court of bankruptcy is here faced calls for interpretation of instruments of conveyance in accordance with Illinois

law. Neither statutes nor decisions of Illinois have been pointed to which are clearly applicable. Unless the matter is referred to the State courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by accident of Federal jurisdiction—been determined contrary to the law of the State which in such matters is supreme." *Id.* at 484.

It is petitioner's position that the principle of *Magnolia* must control the present case. It must be borne in mind that *Magnolia* involved private litigants, with no issues of delicate state policy or statutes of doubtful constitutionality looming in the background. The grounds for abstention were simple: private interests in local property might be decided by laws other than those followed within a state unless the federal court awaited determination of these laws by the state supreme court. The same grounds exist in the present case.

Indeed, *Magnolia* went beyond what petitioner now asks this Court to decide. There, the district court judge was not as assured of a state supreme court decision on point as is now the case here. Furthermore, this Court there held, in effect, that the district court had a *duty* to remit the questions to a state forum; here it is requested only to hold that issuance of a stay was within the judge's *permissible* discretion.

In arriving at its decision, the 10th Circuit evidently perceived the logical problems posed by *Magnolia*. It elided them by stating that "the Supreme Court has been reluctant to go beyond Magnolia." The first, and shortest retort to this line is to reiterate the obvious, namely, that *Magnolia as written* is enough to uphold the trial judge's stay order below, and there is no need

to "go beyond it." Beyond this, the 10th Circuit's remark is patently inaccurate. In 1959 the Supreme Court handed down *Louisiana Power & Light Co.* v. *Thibodaux, supra,* affirming a trial judge's remission of an eminent domain case to state courts and, in the view of its three articulate dissenters, going far beyond *Magnolia.* Furthermore, this analysis does not suffer from *County of Allegheny* v. *Mashuda,* 360 U.S. 185 (1959), decided on the same day as *Thibodaux,* since *Mashuda* involved no difficult question of state law.

Even if the 10th Circuit's opinion were not wrong on the basis of decisional law, it invites review and reversal because it appears to have confused the question of whether a trial judge *may* withhold jurisdiction with the question of whether he *must* withhold it.

The essence of the whole abstention doctrine is the soundness of a trial court's discretion. As this Court put it in *Burford* v. *Sun Oil Co.,* when a court declines to assert jurisdiction the question is always whether "[A]ssuming that the federal court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?" *Cf. Landis* v. *North American Co.,* 299 U.S. 248 (1936). Petitioner contends that in this case the issuance of the stay order lay within the district judge's allowable area of discretion. This is not to say it would have been an abuse of discretion if he had *not* issued the stay. Yet the Circuit Court proceeded to a third conclusion—that it was an abuse of discretion to issue the stay—with no attention given to the middleground of discretionary action. In effect, the Circuit Court held that the trial court had a *duty* to hear and decide the case without issuing a stay pending state court

clarification of controlling issues (for this is the logical corollary of a holding that it was an abuse of discretion to issue the stay). Such a holding, however, in a case where (1) the controlling state law is undecided, and (2) a definitive resolution of this law is imminent is, petitioner submits, neither sound nor logically deducible from precedent.

Granted that the real issue below was the soundness of the trial court's discretion, it is obvious that the 10th Circuit gave exceedingly short shrift, or no consideration at all, to several important factors. It did not even discuss, for example, the fact that it was merely a stay order rather than a dismissal that was involved. Yet in the first instance jurisdiction is retained while in the second it is not; and the distinction is important for the reasons suggested by Justice Frankfurter in *Louisiana Power & Light Co.* v. *Thibodaux, supra* at 27 n. 2. It gave no thought to the extraordinary character of a mandamus writ. It made no mention of the multi-party character of the litigation, or the fact that real property interests were at stake. *Cf. Greenshields* v. *Warren Petroleum Corp.*, 248 F. 2d 61, 70 (10th Cir. 1957); *Clay* v. *Sun River Mining Co., supra.*

The importance of the fact of a real property interest, in light of the policy favoring uniformity in diversity cases, is well stated in *Humble Oil Co.* v. *Sun Oil Co., supra,* where the court stated:

> "This rule of decision in real cases is so strong that, where a principle of law establishing a rule of property has been settled in the state court, the same rule will be applied by a federal court rather than the rule announced in a prior federal decision."

Federal courts, of course, must defer to lower state court decisions in diversity cases. *Clay* v. *Sun River Mining Co., supra.* See also *Phillips Petroleum Corp.* v. *Cabot Co., supra,* where this court vacated a 10th Circuit decision in conflict with a subsequent decision by the Oklahoma Corporation Commission, remanding it to the Court of Appeals for reconsideration in light of the Commission ruling.

More important, the 10th Circuit did not consider the possibility that a decision on the merits below by the district court could well be an extravagantly futile act. This could result, of course, if it should render a decision on the instant lease in accordance with that of its parent circuit court of appeals in *Rogers* v. *Westhoma Oil Co., supra,* and between that decision and its appeal, the Oklahoma supreme court should render its decision in accord with the decisions by the Oklahoma district courts in *Westhoma Oil Co.* v. *B. C. Rist* and *Peerless Oil Co.* v. *Carpenter.* The result would naturally be that the same 10th Circuit that has here vacated the stay would then be compelled to remand the case for reconsideration in light of the contradictory decision in the Oklahoma supreme court, the ultimate spokesman for internal Oklahoma law. Furthermore, the 10th Circuit seems to have been preoccupied with what it regarded as the ordinary or "run of the mine" character of the litigation being pressed below. Never did it give any thought to the simple fact that the "ordinary" or "extraordinary" quality of the litigation itself has nothing to do with the suitability of the abstention doctrine. The doctrine may be appropriate whether the legal question is exotic or run-of-the-mine.

The instant case offers a suitable vehicle for further clarification of the abstention doctrine. It would appear

that the proper answer to the "question presented" above should be "No." At least in a case involving interests in land—a matter pre-eminently local in character—it seems that it should lie within a trial judge's allowable area of discretion to stay a proceeding where the controlling state law is wholly undetermined but a definitive pronouncement of this law is imminent. Even if such a principle of law were not fairly inferable from federal precedents, petitioner respectfully submits that it is a salutary rule, deserving of this Court's adoption in the present case.

Regardless of the foregoing, the remedy imposed by the 10th Circuit was obviously at odds with the principle enunciated in *Brillhart* v. *Excess Ins. Co. of America, supra.* In *Brillhart,* a case procedurally analogous to the present one, the Supreme Court held that a Court of Appeals had erred—after it had found an abuse of discretion in a trial court's dismissal of an action—in requiring the district court to proceed to a disposition on the merits rather than allowing it an opportunity for a proper exercise of discretion. There, the factors relied upon by the trial court in refusing to exert its jurisdiction, were not apparent in the record on appeal. *Id* at 494, note 1. The same is true in the instant case. The point of *Brillhart* was succinctly stated by Justice Frankfurter in these words:

> "Where a district court is presented with a claim such as was made here, it should ascertain whether the questions in controversy between the parties to the federal suit, and which are not foreclosed under the applicable substantive law, can better be settled in the proceeding pending in the state court. This may entail inquiry into the scope of the pending state court proceeding and the nature of defenses open there. The federal court may

> have to consider whether the claims of all parties . . . can satisfactorily be adjudicated in that proceeding, whether necessary parties have been joined, whether such parties are amenable to process . . ., etc." (495).

The point has obvious application here. Even if the Court of Appeals had felt that *prima facie* evidence of an abuse of discretion were present, it should certainly have remitted the cause for a proper exercise of discretion, with reasons therefor fully enunciated, rather than immediately requiring disposition on the merits. A clear marshalling of pertinent reasons for abstention is "a matter for determination, certainly in the first instance, by the district court." *Id* at 496.

CONCLUSION

For the reasons assigned above, petitioner respectfully requests that this petition for writ of certiorari be granted. More particularly, petitioner prays that the decision of the Court of Appeals below be reversed or, alternatively, that the court be directed to remand the case to the District Court for the Western District of Oklahoma for a more complete elaboration of its reasons for granting the stay order, and for reconsid-

eration in light of circumstances developing since the order was issued.[3]

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[3] Among other important circumstances which the Court of Appeals did not consider is the fact that the two state court actions were filed almost immediately after the first Federal action, and that, so far as the record discloses, some of the Federal actions were filed *after* the state cases. Moreover, the last consolidation order, involving the 19 cases here in issue, was entered in February of 1962.

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7042—July Term, 1962

Filed United States Court of Appeals, Tenth Circuit
August 21, 1962

On Petition for Writ of Mandamus

Otto G. Lutes, Florence Lutes, B. B. French, Jewell French, L. O. Hood, Myrtle Hood, D. M. Brower, Mildred Brower, Carl R. Stalcup, Millie L. Stalcup, Ida F. Wray, E. F. Bruce, Geraldine Bruce, J. J. French, Thesia French, Riffe Wesley, Hazel Riffe, Ostby S. Austin, Ethel Austin, Jessie E. Brown, D. L. Hamilton, Helen Hamilton, Harry G. Riffe, Myrtle Riffe, G. F. Price, Flora Lee Price, Lewis B. Carpenter, Mary E. Carpenter, E. L. Carpenter and Blanche M. Carpenter, *Petitioners,*

v.

The United States District Court for the Western District of Oklahoma and The Honorable Stephen S. Chandler, Chief Judge of the United States District Court for the Western District of Oklahoma, *Respondents.*

Paul R. Kitch (Wayne Coulson, Dale M. Stucky, Robert T. Cornwell, Jerome F. Henry, Auburn G. Light, and James R. Yoxall were with him on the brief) for Petitioners.

Richard W. Fowler (Cochran, Dudley, Fowler, Rucks, Baker & Jopling, Of Counsel, were with him on the brief) for Respondents.

Before PHILLIPS, BREITENSTEIN and SETH, Circuit Judges.

BREITENSTEIN, Circuit Judge.

In this original mandamus proceeding we are asked to vacate a federal district court order staying further proceedings in 19 cases pending in that court until certain companion cases are decided in the Oklahoma state courts. The controversy is related to the situation presented to us in the group of cases reported as Rogers v. Westhoma Oil Company, 10 Cir., 291 F. 2d 726.

The petitioners here are, and the appellants-plaintiffs in Rogers v. Westhoma were, the lessors or successors of lessors of oil and gas leases covering lands in an established and productive field located in Seward County, Kansas, and Texas County, Oklahoma. Rogers v. Westhoma concerned Kansas lands and this litigation concerns Oklahoma lands. Except for differences in the names of the lessors and the descriptions of the land covered, the leases are identical in all pertinent provisions.

The claims presented in Rogers v. Westhoma and in these cases are that the leases had expired as to all horizons below sea level because of failure to obtain production within the primary terms. Of the 27 cases involved in Rogers v. Westhoma 24 were brought in Kansas state

courts and removed to federal court by Westhoma on the grounds of diversity while 3 were brought originally in federal court. We held in Rogers v. Westhoma that the leases had terminated as to all below-sea-level horizons.

Thereafter these suits involving Oklahoma lands were brought in the United States District Court for the Western District of Oklahoma against Westhoma and others asserting that the Oklahoma leases had terminated as to all below-sea-level horizons. After some, but not all, of these 19 cases were filed, Westhoma brought suits in the District Court of Texas County, Oklahoma, to quiet its title against the claim of termination. The state court suits presented leases identical, except for lessors and land descriptions, to those in the federal court. As there was no diversity the state court suits were not removable.

Westhoma applied to the federal court for an order staying the proceedings until the decision in the state court suits. The stay was granted and the petitioners seek by this mandamus proceeding to have it vacated.

The decision in Rogers v. Westhoma was based on the construction, interpretation, and application of the lease provisions under the Kansas rules pertaining to oil and gas leases. Westhoma concedes that the cases now under consideration, both federal and state, present the same fact situation and the same lease form as were presented in Rogers v. Westhoma; that the decision in Rogers v. Westhoma was not based on any Kansas statute or decision; that there is no Oklahoma statute requiring or justifying a different decision; and that the Kansas and Oklahoma rules of oil and gas lease construction do not differ in any pertinent regards.

Westhoma bluntly contends that the decision in Rogers v. Westhoma was wrong even under Kansas law and points out that the decision, from which there was a dissent, overruled a judgment entered by a federal judge who is now

a member of this court. The honest differences of opinion as to the construction of these unusual lease forms when applied to the peculiar facts admittedly existing may encourage, but do not justify, the forum-shopping which has occurred. The original Kansas cases were brought in state court and were removed by Westhoma to federal court. After our adverse decision Westhoma concluded that it would rather cast its lot with the state courts and when the petitioners herein brought suits in federal court in Oklahoma, Westhoma countered with non-removable state court suits and now says that such suits will determine the issues and bind the federal court as to leases covering Oklahoma land.

We have before us routine contract cases in which private parties disagree as to the effect of private contract provisions. The issues do not present any federal or state constitutional or statutory questions. No public officials or public agencies will be affected by the result. No hazard of a disturbance in the sensitive field of federal-state relationships is suggested. If we were to forego the exercise of the properly invoked diversity jurisdiction until state court decisions were obtained on identical contracts applying to identical facts, then the doctrine of abstention is extended far beyond any limits which have as yet been fixed by the Supreme Court of the United States and an easy method is afforded the district courts for the avoidance of decisions in difficult cases.

The principles applicable to abstention were canvassed in Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, and County of Allegheny v. Frank Mashuda Co., 360 U.S. 185. The Louisiana case held that a federal district court properly deferred proceedings in an eminent domain case until the state supreme court had been afforded an opportunity to interpret a questioned state statute. In the Allegheny County case the federal suit challenged the validity of an eminent domain taking. There

was pending at the time a state court suit to assess damages for the same taking. The trial court dismissed on the ground that a federal court should not interfere with an eminent domain proceeding brought under color of state law. The Supreme Court held to the contrary saying in substance that abdication of the obligation to adjudicate controversies properly before a federal court can be justified under the doctrine of abstention only in exceptional circumstances where the relegation of the parties to state court "would clearly serve an important countervailing interest."

In the situation here presented we do not have any question of the interpretation of a state statute and, hence, the reason for abstention present in the Louisiana case does not apply. In the Allegheny County case abstention was disapproved even though a federal court decision favorable to the landhowner would moot the state court proceedings to assess damage. The claim for abstention here asserted has even less substance.

There are no exceptional circumstances in the case at bar. The lower court actions, both federal and state, are between private parties and concern private contracts. Such run-of-the-mine litigation is ordinary and routine. The only question is whether abstention will "clearly serve an important countervailing interest."[1] The only countervailing interest suggested is that the parties are entitled in the first instance to have their controversy adjudicated in state court with the result that such state decision will bind the federal courts under the doctrine of Erie Railroad Co. v. Tompkins, 304 U.S. 64.

Recognition of the principle that in diversity actions a federal district court "is but another local forum and the right to recover is measured by the law of the state"[2] is

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[1] *County of Alleghany* v. *Frank Mashuda Co., supra*, p. 189.

[2] *Berger* v. *State Farm Mutual Automobile Insurance Company*, 10 Cir., 291 F.2d 666, 668.

not decisive of the issue here. The question is not the applicability of state law but of abstention by the federal court from action in cases where its jurisdiction is properly invoked.

In Thompson v. Magnolia Petroleum Co., 309 U.S. 478, the Supreme Court held that the ownership of oil underlying right-of-way lands of a railroad in reorganization under the Bankruptcy Act should be determined in state court action. The Supreme Court has been reluctant to expand the ruling in Thompson v. Magnolia. The later, and oft-quoted, decision in Meredith v. Winter Haven, 320 U.S. 228, 236, said:

> "Congress having adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount, we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine."

Markham v. Allen, 326 U.S. 490, held that a federal district court properly exercised its discretion in entertaining a suit by the Alien Property Custodian to determine his share in a decedent's estate in course of probate administration in a state court, even though the suit involved issues of state law. In Propper, Receiver, v. Clark, Attorney General, etc., 337 U.S. 472, another case involving the Alien Property Custodian, the court held that the federal court was not precluded from determining rights to property in the hands of a state court under a state receivership. Lumbermen's Mutual Casualty Co. v. Elbert, 348 U.S. 48, a case involving diversity jurisdiction and the Louisiana Direct Actions Statute, held that a federal court could not decline, as a matter of discretion, to exercise jurisdiction over an insurer alone even though the Louisiana standards of appellate review differed from the federal standards.

As we see the problem, the case at bar presents less reason for abstention than existed in any of the cases mentioned above. The state court cases involve different parties and res judicata will not apply. Neither our decision in Rogers v. Westhoma nor the state court decisions will assuredly control the federal cases which are now stayed. In Rogers v. Westhoma the defenses of estoppel and laches were waived. Counsel for Westhoma, appearing here for respondents, said in argument that in the Oklahoma cases, both state and federal, these defenses will be asserted. Further, Rogers v. Westhoma was presented on the basis that "occurrence of production on or off the leased premises included within a unit makes no difference in the disposition of the controversy"[3] and counsel tell us that in the Oklahoma cases this concession will not be made.

The possibility of a different result in the state cases from that in the federal cases creates no exceptional circumstance in which abstention will serve an important countervailing purpose. That possibility is weakened by the impossibility of assurance at this time that the cases will be decided on the same issues. Even though the possibility ripens into actuality the incongruity of conflicting decisions as to the Oklahoma lands is no more distasteful than would be the attainment of one result for the Kansas lands and another for the Oklahoma lands. Federal jurisdiction was properly invoked before the state cases were filed and we see no reason why the exercise of that jurisdiction should be stayed.

In our opinion the trial court abused its discretion in granting the stay order.[4] In such circumstances the writ

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[3] *Rogers* v. *Westhoma, supra,* p. 729.

[4] *United States* v. *Bureau of Internal Revenue of State of New Mexico,* 10 Cir., 291 F.2d 677, 679.

of mandamus lies to require the district court to proceed with and determine the actions pending before it.[5]

Leave to file the application for a writ of mandamus is granted. The response to that application thoroughly presents all pertinent issues and as the case has been briefed and argued on the merits the response to the application is taken as the response to a show-cause order. The writ is granted and the district court is directed to vacate its orders staying further proceedings in cases numbered 9410, 9411, 9412, 9413, 9414, 9415, 9419, 9421, 9431, 9435, 9446, 9448, 9453, 9489, 9494, 9504, 9512, 9513, and 9543 now pending on the docket of the United States District Court for the Western District of Oklahoma, and to proceed with and determine those cases.

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[5] *McClellan* v. *Carland*, 217 U.S. 268, 280; *In re President and Fellows of Harvard College*, 1 Cir., 149 F. 2d 69, 73. See also *LaBuy* v. *Howes Leather Co., Inc.*, 352 U.S. 249, 260.

APPENDIX B

Order of Judge Chandler

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

March 29, 1962

LIGHT & YOXALL
Liberal, Kansas

FLEENCE, GOOING, COULSON & KITCH
901 First National Bank Building
Wichita 2, Kansas

HENRY & HENRY
1356 First National Building
Oklahoma City, Oklahoma

COCHRAN, DUDLEY, FOWLER, RUCKS, BAKER & JOPLING
First National Building
Oklahoma City, Oklahoma

Re: Lutes et al v. Westhoma Oil Co. et al,
Civil Case Nos. 9410, 9411, 9412,
9413, 9414, 9415, 9419, 9421, 9431,
9435, 9446, 9448, 9453, 9489, 9490,
9494, 9503, 9504, 9505, 9512, 9513,
9525, 9543.

Gentlemen:

Upon consideration of defendants' motions to stay, I have come to the conclusion that under the doctrine of abstention and in the interest of comity between state and federal courts, I must exercise the discretion granted me by staying the proceedings in these cases until the question involved herein has been decided in the cases now pending in the courts of the State of Oklahoma, and decision thereon has become final. It is so ordered.

Very truly yours,

/s/ STEPHEN S. CHANDLER

APPENDIX C

Motion of Petitioner to Modify and Correct Opinion

(3 Attachments)

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

August 30, 1962

Filed United States Court of Appeals, Tenth Circuit

ON PETITION FOR WRIT OF MANDAMUS

OTTO G. LUTES, FLORENCE LUTES, B. B. FRENCH, JEWELL FRENCH, L. O. HOOD, MYRTLE HOOD, D. M. BROWER, MILDRED BROWER, CARL R. STALCUP, MILLIE L. STALCUP, IDA F. WRAY, E. F. BRUCE, GERALDINE BRUCE, J. J. FRENCH, THESIA FRENCH, RIFFE WESLEY, HAZEL RIFFE, OSTBY S. AUSTIN, ETHEL AUSTIN, JESSIE E. BROWN, D. L. HAMILTON, HELEN HAMILTON, HARRY G. RIFFE, MYRTLE RIFFE, G. F. PRICE, FLORA LEE PRICE, LEWIS B. CARPENTER, MARY E. CARPENTER, E. L. CARPENTER AND BLANCHE M. CARPENTER, *Petitioners,*

v.

THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA AND THE HONORABLE STEPHEN S. CHANDLER, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, *Respondents.*

MOTION

Respondents respectfully move the Court to modify one paragraph of the Court's opinion herein in order to correct a misunderstanding of the facts involved, and in order

that all of the relevant facts may be made a matter of record for consideration by the United States Supreme Court upon the petition for certiorari presently being prepared. The paragraph referred to, on pages 12 and 13 of the Court's opinion, is as follows:

> "As we see the problem, the case at bar presents less reason for abstention than existed in any of the cases mentioned above. The state court cases involve different parties and res judicata will not apply. Neither our decision in Rogers v. Westhoma nor the state court decisions will assuredly control the federal cases which are now stayed. In Rogers v. Westhoma the defenses of estoppel and laches were waived. Counsel for Westhoma, appearing here for respondents, said in argument that in the Oklahoma cases, both state and federal, these defenses will be asserted. Further, Rogers v. Westhoma was presented on the basis that 'occurrence of production on or off the leased premises included within a unit makes no difference in the disposition of the controversy' and counsel tell us that in the Oklahoma cases this concession will not be made."

The grounds of the motion are:

1. Counsel for Westhoma did not intend in argument to convey the impression that the defenses of estoppel and laches "will be asserted" in the state court cases, and such is not the fact. As appears from copies of the state court judgments attached hereto, the fact is that there is no issue of estoppel or laches in the state court cases. The *sole issue* therein is the *precise question* of law which was decided in *Rogers* v. *Westhoma* and is decisively involved in the federal court cases pending below.

2. The Court's words, "these defenses will be asserted" and "this concession will not be made", are believed to be susceptible of the inference that the state court cases are not yet at issue or have not yet been decided. The fact is, however, as shown by the attached copies, that the state

court cases were tried on March 22, 1962, and were decided in Westhoma's favor on June 13, 1962. This Court's record, as it now stands, does not reflect the state court decisions because they were not rendered until after the response was filed herein and because this Court, although advised thereof in oral argument, did not mention them in its opinion. It is believed that the state court decisions and the fact that appeals therefrom to the State Supreme Court are in process,[1] are relevant and important facts which should appear of record in order that the United States Supreme Court may be apprised thereof.

Wherefore, respondents move the Court to modify the opinion herein in such manner that the same will reflect the facts (1) that there are no issues of laches or estoppel in the state court cases, (2) that the state court cases were decided in Westhoma's favor on June 13, 1962, and (3) that appeals to the Oklahoma Supreme Court are being taken by the defendants therein.

The undersigned attorney hereby certifies that the attachments hereto are true and correct copies of the judgments and orders allowing appeals in two of the state court cases, as the same appear of record in the office of the Clerk of the District Court of Texas County, Oklahoma.

RICHARD W. FOWLER
1133 First National Building
Oklahoma City 2, Oklahoma
Attorney for Respondents

[1] The appeals were filed in the State Supreme Court on August 27, 1962.

APPENDIX C

(Attachment 1)

Journal Entry of Judgment
Westhoma v. Rist

IN THE DISTRICT COURT WITHIN AND FOR
TEXAS COUNTY, OKLAHOMA

No. 10,596

WESTHOMA OIL COMPANY, a corporation, *Plaintiff*

v.

B. C. RIST AND GLADYS RIST, *Defendants.*

Journal Entry of Judgment

This cause, pursuant to regular assignment, came on for trial on the 22nd day of March, 1962, all of the parties hereto appearing by their respective attorneys of record, all of whom announced ready for trial.

The parties submitted for the court's consideration a Stipulation of Facts, and thereupon the parties rested their respective cases, and the court took the decision of said cause under advisement.

Now, on this 13th day of June, 1962, the parties again appear by their respective attorneys of record; and the court, having considered said Stipulation of Facts and the briefs and arguments of the parties and being fully advised in the premises, finds the issues generally in favor of the plaintiff and against the defendants, and finds that the allegations of plaintiff's petition are true and correct and that judgment should be entered in accordance therewith.

It is therefore ORDERED, ADJUDGED AND DECREED by the court: that the plaintiff, Westhoma Oil Company, is the owner of a valid and subsisting oil and gas lease covering and affecting, among other lands, the following described property situated in Texas County, State of Oklahoma, to-wit:

> The Southeast Quarter (SE 1/4) of Section 2, Township 5 North, Range 18 ECM,

except as to those depths, horizons and strata which are situated above, and only above, sea level; that said oil and gas lease has been maintained, and presently is being maintained, in full force and effect on said lands described above with respect to all depths, horizons and strata therein and thereunder, both above and below sea level, by the continuing production of natural gas from a well located on lands heretofore pooled with said lands described above and producing from the Guymon-Hugoton pool at a depth wholly above sea level; that the interest of the defendants in and to the lands described above, with respect to all depths, horizons and strata therein and thereunder, both above and below sea level, is subject to all of the terms and provisions of said oil and gas lease, which is of record in Book 233 at Page 270 of the records of the County Clerk of Texas County, Oklahoma; that the claims of the defendants that said oil and gas lease has terminated as to all depths, horizons and strata below sea level are unfounded, invalid and without right, and that said claims constitute a cloud upon the said oil and gas leasehold title of the plaintiff as to all depths, horizons and strata below sea level underlying said lands above described; that the plaintiff's said oil and gas leasehold title is hereby quieted as against any and all claims of the defendants, and that the defendants, and all persons claiming by, through or under either or both of them, are hereby restrained and enjoined from asserting any right, title or interest in or to said lands above described adverse to the said oil and gas

leasehold title of the plaintiff; and that the plaintiff have judgment against the defendants for plaintiff's costs herein expended.

To all of the foregoing findings and the judgment of the court the defendants, and each of them, except, and their exceptions are allowed.

/s/ C. R. Board
District Judge

Approved as to Form:

/s/ Vincent Dale
Attorney for Plaintiff

/s/ Tryon, Sweet & Hensley
Attorney for Defendants

Filed July 2, 1962

Recorded in Book
42, Page 366

APPENDIX C

(Attachment 2)

Journal Entry of Judgment
Peerless Oil Co. v. Carpenter

IN THE DISTRICT COURT WITHIN AND FOR
TEXAS COUNTY, OKLAHOMA

No. 10,597

PEERLESS OIL AND GAS COMPANY, a Corporation, JAKE L. HAMON, and WESTHOMA OIL COMPANY, a Corporation, *Plaintiffs,*

vs.

ERNEST L. CARPENTER and BLANCH M. CARPENTER, *Defendants.*

JOURNAL ENTRY OF JUDGMENT

This cause, pursuant to regular assignment, came on for trial on the 22nd day of March, 1962, all of the parties hereto appearing by their respective attorneys of record, all of whom announced ready for trial.

The parties submitted for the Court's consideration a Stipulation of Facts, and thereupon the parties rested their respective cases, and the court took the decision of said cause under advisement.

Now, on this 13th day of June, 1962, the parties again appear by their respective attorneys of record; and the court, having considered said Stipulation of Facts and the briefs and arguments of the parties and being fully advised in the premises, finds the issues generally in favor of the plaintiffs and against the defendants, and finds that the allegations of plaintiffs' petition are true and correct and that judgment should be entered in accordance therewith.

It is therefore ORDERED, ADJUDGED AND DECREED by the court: That the plaintiffs, Peerless Oil & Gas Company and Jake L. Hamon, are the owners of a valid and subsisting oil and gas lease covering and affecting, among other lands, the following described property situated in Texas County, State of Oklahoma, to-wit:

The Northwest Quarter (NW/4) of Section 34, Township 6 North, Range 18 ECM,

except as to those depths, horizons and strata which are situated above, and only above, sea level, and that said oil and gas leasehold interest is subject to an overriding royalty interest therein owned by the plaintiff, Westhoma Oil Company; that said oil and gas lease has been maintained, and presently is being maintained, in full force and effect on said lands described above with respect to all depths, horizons and strata therein and thereunder, both above and below sea level, by the continuing production of natural gas from a well located on said lands described above and producing from the Guymon-Hugoton pool at a depth wholly above sea level; that the interest of the defendants in and to the lands described above, with respect to all depths, horizons and strata therein and thereunder, both above and below sea level, is subject to all of the terms and provisions of said oil and gas lease, which is of record in Book 233 at Page 322 of the records of the County Clerk of Texas County, Oklahoma; that the claims of the defendants that said oil and gas lease has terminated as to all depths, horizons and strata below sea level are unfounded, invalid and without right, and that said claims constitute a cloud upon the said oil and gas leasehold title of the plaintiffs as to all depths, horizons and strata below sea level underlying said lands above described; that the plaintiffs' said oil and gas leasehold title is hereby quieted as against any and all claims of the defendants, and that the defendants, and all persons claiming by, through or under either or both of them, are hereby restrained and en-

joined from asserting any right, title or interest in or to said lands above described adverse to the said oil and gas leasehold title of the plaintiffs; and that the plaintiffs have judgment against the defendants for plaintiffs' costs herein expended.

To all of the foregoing findings and the judgment of the court the defendants, and each of them except, and their exceptions are allowed.

/s/ C. R. Board, *District Judge.*

Approved as to Form:

/s/ Vincent Dale
Attorney for Plaintiffs

/s/ Tryon, Sweet & Hensley
Attorney for Defendants

Filed July 2, 1962

Recorded in Book 42 of Civ J. Page 367

APPENDIX C

(Attachment 3)

Journal Entry Overruling Motion For New Trial and Allowing Appeal

IN THE DISTRICT COURT IN AND FOR
SAID COUNTY AND STATE

No. 10,597

STATE OF OKLAHOMA,
COUNTY OF TEXAS, SS:

PEERLESS OIL AND GAS COMPANY, a Corporation, JAKE L. HAMON, and WESTHOMA OIL COMPANY, a Corporation,
Plaintiffs,

v.

ERNEST L. CARPENTER and BLANCH M. CARPENTER,
Defendants.

JOURNAL ENTRY OVERRULING MOTION FOR NEW TRIAL AND ALLOWING APPEAL

On this 20th day of June, 1962, there came on for hearing the Motion of the Defendants herein for New Trial, Defendants being present by their attorneys: Robert T. Cornwell of Fleeson, Gooing, Coulson & Kitch; James Yoxall of Light & Yoxall; and L. E. Tryon, Tryon, Sweet & Hensley. The Court having heard the arguments of counsel and being fully advised upon consideration thereof, finds that said Motion for New Trial should be overruled.

IT IS THEREFORE ORDERED AND ADJUDGED that the Motion of the Defendants for a New Trial be and the same is hereby overruled; to which ruling of the Court the Defendants then and there excepted and the exceptions were allowed

by the Court. Thereupon, counsel for Defendants gave notice in open court of their intention to appeal the Judgment made and entered herein on the 13th day of June, 1962, the Order of the Court made and entered herein on the 20th day of June, 1962, overruling Defendants' Motion for New Trial, and all findings, rulings, Orders and Judgments made and entered on the 13th day of June, 1962, and the 20th day of June, 1962, which are contrary to Defendants' interests as reflected in the Court's Journal Entries of said dates; said Appeal being made to the Supreme Court of the State of Oklahoma.

And said Defendants praying an Appeal to the Supreme Court and an extension of time within which to make and serve case-made, IT IS ORDERED that an extension of thirty (30) days from this date be granted said defendants to make and serve case-made, Plaintiffs to have ten (10) days thereafter to suggest amendments, same to be settled on five (5) days' notice in writing by either party.

/s/ C. R. BOARD, *District Judge.*

OK

TRYON, SWEET & HENSLEY
By /s/ L. E. Tryon
Attorneys for Defendants

DALE & DALE
By /s/ Vincent Dale
Attorneys for Plaintiffs

Filed July 2, 1962

Book 42, Civ J. Page 366-367

APPENDIX D

Opinion of the Court of Appeals Denying Motion to Modify and Correct United States Court of Appeals for the Tenth Circuit.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 7042—SEPTEMBER TERM, 1962

Filed United States Court of Appeals, Tenth Circuit

September 11, 1962

OTTO G. LUTES, FLORENCE LUTES, B. B. FRENCH, JEWELL FRENCH, L. O. HOOD, MYRTLE HOOD, D. M. BROWER, MILDRED BROWER, CARL R. STALCUP, MILLIE L. STALCUP, IDA F. WRAY, E. F. BRUCE, GERALDINE BRUCE, J. J. FRENCH, THESIA FRENCH, RIFFE WESLEY, HAZEL RIFFE, OSTBY S. AUSTIN, ETHEL AUSTIN, JESSIE E. BROWN, D. L. HAMILTON, HELEN HAMILTON, HARRY G. RIFFE, MYRTLE RIFFE, G. F. PRICE, FLORA LEE PRICE, LEWIS B. CARPENTER, MARY E. CARPENTER, E. L. CARPENTER AND BLANCHE M. CARPENTER, *Petitioners,*

v.

THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA AND THE HONORABLE STEPHEN S. CHANDLER, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, *Respondents.*

Before PHILLIPS, BREITENSTEIN AND SETH, Circuit Judges.

PER CURIAM.

The respondents have presented a motion for modification of the opinion filed herein. The portions of the opinion

attacked in the motion were based on statements made by counsel for the respondents in open court at the time of the oral argument. The records of state court proceedings submitted in support of the motion all bear dates prior to the date of the argument of this cause and were not then presented to the court nor made a part of the record of this cause. Those state court records neither state nor define the issues presented to or considered by the state court and show no more than the judgment of the state court that the leases had not terminated. The motion for modification of opinion is denied.

APPENDIX E

Summary and History Appending State Court Actions (2 Attachments)

There are presently pending in the State of Oklahoma four quiet title actions involving the proper construction of a "Pugh" Clause in light of a consolidation and unitization of oil properties covered by the leasehold instrument in which the clauses appears, and in light of assignments of producing horizons below and above sea level. This "Pugh" clause appears in substantially identical form in the state actions and the nineteen pending Federal court cases.[1] It appears within Sec. 9 of the pertinent oil

[1] Lessee is expressly granted the right and privilege (which lessee may exercise at any time either before or after production has been obtained upon this premises or any premises consolidated herewith) to consolidate the leasehold estate, created by the execution and delivery of this lease, or any part or parts thereof, with the mineral leasehold estate or estates or parts thereof in any other lands upon which this lessee shall at the time own valid and subsisting lease or leases, located and situated near the property described herein, provided that any resulting consolidated estate shall not cover and include more than 2560 acres. Any consolidation of estates herein authorized shall be consummated when the owner of the leasehold estate created hereby shall have executed and filed for record in the office of the County Clerk of the county or counties in which the same or any part thereof is located, a statement designating and describing such properties so consolidated and declaring lessee's intention to consolidate same, and in the event of any such consolidation, it is agreed:

(a) This lease shall thereafter continue in full force and effect for all purposes as to the premises covered hereby and included in any such consolidation of estates, so long as gas is or can be produced from any well located on any part of the land included in such consolidation (whether on lands covered hereby or not), except as herein otherwise provided, or so long as oil is or can be produced from any well drilled on a portion of the land covered hereby.

(b) During the primary term hereof and until production has been obtained, from this or the consolidated leasehold, the lessee

and gas mining lease which is attached to the complaint in *Otto Lutes* v. *Westhoma Oil Company*, Civil Action No. 9410 in the Federal District Court. (See first attachment to Petition for Writ of Mandamus in the United States Court of Appeals for the 10th Circuit (R. p.). The "Pugh" clause also appears, in *identical* form, in Sec. 9 of the oil and gas mining lease attached to the petitions filed in the District Court for Texas County, Oklahoma, styled *Westhoma Oil Co.* v. *B. C. Rist*, Civil No. 10596; and *Peerless Oil and Gas Co.* v. *Ernest L. Carpenter*, Civil No. 10597. (See Appendix E, Attachs. 1, 2 immediately following this Summary).

Two of the actions were filed in the District Court of Texas County, Oklahoma on September 14, 1961. Specifically, they were *Westhoma Oil Co.* v. *B. C. Rist and Gladys E. Rist*, Civil No. 10596; and *Peerless Oil & Gas Co. et al* v. *Ernest L. Carpenter and Blanche M. Carpenter*, No. 10597. (See Appendix E, Attach, 2 *infra.*). Subsequently, two additional actions were brought in the same State District Court, one of these actions involved identical parties, identical lease provisions and identical land as was involved in one of the nineteen actions pending in federal court. These latter cases were filed October 12, 1961.[2] The first two state court actions were tried in the District

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shall be privileged to pay the annual delay rentals stipulated herein on any part of this leasehold included in a consolidation of estates or not so included, and thereby continue this lease in full force and effect as to the part or portions thereof upon which rentals are so paid, but this lease, insofar as it covers any tract or tracts not included in a consolidation of estates held in force by production as herein provided, shall terminate at the expiration of the primary term hereof, unless oil, gas, or other minerals is or can be produced from a well or wells thereon.

[2] *It will be noted that all four state court actions were brought before the first consolidation order entered by the Federal District Court on October 18, 1961.* This order consolidated actions 9409, 9410, 9411, 9412, 9413, 9414, 9415, 9419, 9421, 9431, 9435, 9446, 9448, and 9453.

Court of Texas County, Oklahoma, upon a stipulation of facts. The two actions were tried on March 22, 1962 and the court rendered judgment therein for Plaintiff *Westhoma Oil Co.*, which was later filed on July 22, 1962. Defendants in both actions filed motions for a new trial. The motions were denied on June 20, 1962. At the hearing on the motions Defendants gave notice of their intention being duly noted and leave being specifically granted in the journal entry overruling the motions for a new trial, filed in both cases on July 2, 1962. (See Appendix C, Attach. 1 and Appendix C, Attach. 2 respectively; R. p. .) The appeals of these two cases were duly filed in the Supreme Court of Oklahoma on August 27, 1962 and are presently awaiting argument (Docket No. 40226, *Rist* case; 40227, *Carpenter* case).

The second pair of state court actions have not yet been tried. By stipulation between opposing counsel it was agreed that these two cases will await the outcome of the other state and Federal litigation. If the Federal action involving the same parties, same lease and same land as the untried state actions is finally decided by an unappealable judgment before the first two state court cases are finally decided by a state court of last resort, the prior Federal decision, according to the stipulation, is to be controlling.

APPENDIX E (ATTACHMENT 1)

Petition and Answer in Westhoma Oil Co. v. B. C. Rist and Gladys E. Rist, No. 10596 (District Court, Texas County, Oklahoma)

IN THE DISTRICT COURT WITHIN AND FOR
TEXAS COUNTY OKLAHOMA

No. 10596

WESTHOMA OIL COMPANY, a corporation, *Plaintiff*,

v.

B. C. RIST AND GLADYS E. RIST, *Defendants*.

PETITION

Comes now the plaintiff above named and, for its cause of action against the defendants above named, alleges and states:

1. Plaintiff is a corporation organized under the laws of the State of Delaware, has its principal place of business in San Antonio, Texas, and at all times herein referred to has been duly authorized to do business in the State of Oklahoma. The defendants are citizens and residents of the State of Oklahoma, residing in Texas County, Oklahoma.

2. On January 8, 1943, the defendant, B. C. Rist, who then was the owner in fee simple of the following described property situated in Texas County, Oklahoma, to wit:

> The Southeast Quarter (SE/4) of Section 2,
> Township 5 North, Range 18 ECM,

joined by his wife, the defendant, Gladys E. Rist, executed and delivered unto Peerless Oil and Gas Company, a corporation, an oil and gas lease covering said land above described and other lands. A true copy of said Oil and Gas Lease is attached hereto as Exhibit "A", and is hereby made a part hereof.

3. Thereafter, on May 31, 1945, the Oklahoma Corporation Commisson, pursuant to the applicable statute, issued its order No. 17867, establishing drilling and spacing units of 640 acres each for the development and production of natural gas from the Guymon-Hugoton Pool, a common source of supply of natural gas underlying an area in Texas County, Oklahoma, at a depth wholly above sea level. Said Section 2 constitutes one of such drilling and spacing units so established by said order.

4. Thereafter, on November 28, 1947, the said Peerless Oil and Gas Company duly assigned said oil and gas lease, in so far as the same covered and affected the said Southeast Quarter (SE/4) of said Section 2, to certain individuals, and on December 15, 1947, said individuals duly assigned said oil and gas lease to plaintiff, in so far as the same covered and affected the said Southeast Quarter (SE/4 of said Section 2, "to the extent of the producing horizons which are situated below, and only below, sea level". A true copy of said assignment to plaintiff is attached hereto as Exhibit "B", and is hereby made a part hereof.

5. Thereafter, on December 27, 1950, said individuals duly assigned unto Hugoton Plains Gas and Oil Company, a corporation, all of their remaining interest in and to said oil and gas lease, which said remaining interest was limited to those horizons situated above sea level and underlying the said Southeast Quarter (SE/4) of Section 2.

6. Thereafter, on January 22, 1961, the said Hugoton Plains Gas and Oil Company, being then the owner also of oil and gas leases covering the North Half (N/2) and the Southwest Quarter (SW/4) of said Section 2, executed a "Declaration of Consolidation of Oil and Gas Leases", pursuant to authority granted in all of the said oil and gas leases covering all of said Section 2, thereby consolidating and unitizing all of said leases into a single unit consisting of all of said Section 2. Said instrument thereafter was

filed for record on February 5, 1951, by the said Hugoton Plains Gas and Oil Company in the office of the County Clerk of Texas County, Oklahoma. A true copy of said instrument is attached hereto as Exhibit "C", and is hereby made a part hereof.

7. On January 30, 1951, the said Hugoton Plains Gas and Oil Company drilled and completed a producing gas well in said Guymon-Hugoton Pool at a depth wholly above sea level and at a lawful location in the Northwest Quarter (NW/4) of said Section 2. On said date all of said oil and gas leases covering all of said Section 2 were in full force and effect due to the timely and proper payment of all accrued drilling delay rentals provided for by said leases. Said well, upon completion, produced natural gas in paying quantities, and has continued at all times thereafter to produce, and presently produces, natural gas in paying quantities. Defendants have been paid their proper proportionate share of the royalty due to them upon such production.

8. By reason of all the foregoing said oil and gas lease, Exhibit "A" hereto, has remained, and presently continues, in full force and effect on the said Southeast Quarter (SE/4) of said Section 2 as to all depths, horizons and strata therein and thereunder, both above and below sea level. Notwithstanding the foregoing, the defendants claim that said oil and gas lease has terminated, and no longer is of any force or effect, as to all depths, horizons and strata below sea level. Said claim by the defendants constitutes a cloud upon the said oil and gas leasehold title of the plaintiff to all depths, horizons and strata below sea level underlying said Southeast Quarter (SE/4) of said Section 2. Said Claim is unfounded and without right, and plaintiff has no adequate remedy at law.

Wherefore, plaintiff prays that it have judgment against the defendants decreeing that said oil and gas lease is valid and subsisting as to all depths, horizons and strata, both

above and below sea level, adjudging plaintiff to be owner thereof as to all depths, horizons and strata below sea level, quieting and confining plaintiff's title thereto, and barring and enjoining the defendants and all persons claiming under them from asserting any claim or interest adverse to plaintiff's said oil and gas leasehold title, for plaintiff's costs herein expended, and for all other and further relief to which plaintiff in equity and good conscience may be entitled.

COCHRAN, DUDLEY, FOWLER, RUCKS, BAKER & JOPLING

By

RICHARD W. FOWLER
1133 First National Building
Oklahoma City 2, Oklahoma
Attorneys for Plaintiff

OIL AND GAS MINING LEASE

THIS AGREEMENT entered into this 8th day of January, 1943 by and between B. C. Rist and wife, Gladys E. Rist the undersigned, hereinafter called Lessor, whether one or more, and PEERLESS OIL AND GAS COMPANY, the undersigned, hereinafter called Lessee,

WITNESSETH:

1. That lessor for and in consideration of the sum of One and No/100 Dollars, ($1.00) in hand paid, and of the covenants and agreements hereinafter contained, to be performed by lessee, have this day granted and leased, and hereby grant and lease and let unto the lessee for the purpose of mining and operating for, and producing oil, gas and casinghead gas and gasoline from the hereinafter described premises, laying pipe lines, building tanks, storing oil, building power stations, rigs, derricks, slush pits, operating boilers, engines, stations, telephone lines and other

structures an appliances to produce, transport, save take care of and manufacture any and/or all such substances and for housing and boarding employees, the following described property situated in the State of Oklahoma, County of Texas, to-wit:

* * * * * * * * * * *

9. Lessee is expressly granted the right and privilege (which lessee may exercise at any time either before or after production has been obtained upon this premises or any premises consolidated herewith) to consolidate the leasehold estate, created by the execution and delivery of this lease, or any part or parts thereof, with the mineral leasehold estate or estates or parts thereof in any other lands upon which this lessee shall at the time own valid and subsisting lease or leases, located and situated near the property described herein, provided that any resulting consolidated estate shall not cover and include more than 2560 acres. Any consolidation of estates herein authorized shall be consummated when the owner of the leasehold estate created hereby shall have executed and filed for record in the office of the County Clerk of the county or counties in which the same or any part thereof is located, a statement designating and describing such properties so consolidated and declaring lessee's intention to consolidate same, and in the event of any such consolidation, it is agreed:

(a) This lease shall thereafter continue in full force and effect for all purposes as to the premises covered hereby and included in any such consolidation of estates, so long as gas is or can be produced from any well located on any part of the land included in such consolidation (whether on lands covered hereby or not), except as herein otherwise provided, or so long as oil is or can be produced from any well drilled on a portion of the land covered hereby.

(b) During the primary term hereof and until production has been obtained from this or the consolidated leasehold, the lessee shall be privileged to pay the annual delay rentals stipulated herein on any part of this leasehold included in a consolidation of estates or not so included, and thereby continue this lease in full force and effect as to the part or portions thereof upon which rentals are so paid, but this lease, insofar as it covers any tract or tracts not included in a consolidation of estates held in force by production as herein provided, shall terminate at the expiration of the primary term hereof, unless oil, gas, or other minerals is or can be produced from a well or wells thereon.

IN WITNESS WHEREOF, We sign the day and year first above written.

B. C. RIST
GLADYS E. RIST

ASSIGNMENT OF OIL AND GAS LEASES

KNOW ALL MEN BY THESE PRESENTS:

That Vernon Taylor Jr., of Bexar County, Texas, Ruth Taylor Campbell, of Montgomery County, Alabama, The Sara H. Taylor Trust (Vernon F. Taylor Trustee thereof), and The James C. Taylor Trust (Vernon F. Taylor Trustee thereof) hereinafter called assignors, in consideration of Ten ($10.00) Dollars and other good and valuable consideration to them passing, the receipt of which is hereby acknowledged, do hereby transfer, assign and convey unto Westhoma Oil Company, a corporation, duly incorporated and existing under the laws of the State of Delaware and having authority to do business both in the State of Oklahoma and in the State of Kansas, hereinafter called assignee, all of the assignors' right, title and interest in and to the oil and gas leases insofar as they cover the herein-

after described lands to the extent of the producing horizons which are situated *below, and only below,* sea leval. Said leases are described below by reference to the dates thereof, name of lessors, name of lessees, county and state in which the property is located, description of the land, and the book and page of the recording thereof, respectively, as follows, to-wit:

REVENUE STAMPS $1.50 affixed.

TEXAS COUNTY, OKLAHOMA

OKL-27 Date: January 8, 1943

Lessor: B. C. Rist and wife, Gladys E. Rist

Lessee: Peerless Oil & Gas Company

Description: SE/4 Section 2-5N-18ECM

Recorded: Book 233, Page 270

Expiration: January 8, 1953
Acreage: 160 Acres

(Together with other leases)

and being leasehold interests heretofore transferred and assigned to the assignors by Peerless Oil & Gas Company.

This transfer and assignment, however, is pursuant to the terms and provisions as set forth in a written agreement between Peerless Oil & Gas Company and these assignors dated September 20, 1944

To have and to hold the same unto the said assignee, its successors and assigns, according to the terms and conditions of said leases.

The effective date of this instrument is January 1, 1948, at seven o'clock A.M.

Witness the hands of the assignors, this 15th day of December, 1947.

VERNON TAYLOR, JR.
Vernon Taylor, Jr.

RUTH TAYLOR CAMPBELL
Ruth Taylor Campbell

VERNON F. TAYLOR
Vernon F. Taylor, as Trustee for
The Sara H. Taylor Trust

VERNON F. TAYLOR
Vernon F. Taylor, as Trustee for
The James C. Taylor Trust

DECLARATION OF CONSOLIDATION
OF OIL AND GAS LEASES

KNOW ALL MEN BY THESE PRESENTS:

THAT Hugoton-Plains Gas and Oil Company, a Corporation, is the owner of the following described valid and subsisting oil and gas leases:

1. From B. C. Rist and wife, Gladys E. Rist, as lessors, to Peerless Oil and Gas Company, lessee, dated January 8, 1943, recorded in Book 233, Page 270, of the records of Texas County, Oklahoma, insofar as said lease covers the following described tract in Texas County, Oklahoma:

> Southeast Quarter (SE¼), Section 2, Township 5 North, Range 18 ECM, containing 160 acres, more or less.

2. From Ernest Woodward and wife, Elsie Woodward, and Alice Rearick, a widow as lessors, to Frank Parkes, lessee, dated June 26, 1944, recorded in Book 252, Page 33, of the records of Texas County, Oklahoma, insofar as said lease covers the following described tract in Texas County, Oklahoma.

Southwest Quarter (SW¼), Section 2, Township 5 North, Range 18 ECM, containing 160 acres, more or less.

3. From Florence R. Duncan, a widow, as lessor, to Peerless Oil and Gas Company, lessee, dated October 18, 1945, recorded in Book 252, Page 104, of the records of Texas County, Oklahoma, and covering the following described tract in Texas County, Oklahoma:

Northwest Quarter (NW¼), Section 2, Township 5 North, Range 18 ECM, containing 160 acres, more or less.

4. From The Commissioners of the Land Office of the State of Oklahoma, acting for and in behalf of the State of Oklahoma, lessor, and Peerless Oil and Gas Company, lessee, dated July 8, 1946, recorded in Book 260, Page 307, of the records of Texas County, Oklahoma, and covering the following described tract in Texas County, Oklahoma:

Lots 1 and 2 and the South Half (S½) of the Northeast Quarter (NE¼), of Section 2, Township 5 North, Range 18 ECM, containing 160 acres, more or less.

Under and by virtue of the provisions of the above described leases, the undesigned is granted the privilege, for the purpose of forming a unit of not to exceed six hundred and forty (640) acres, of consolidating and unitizing each of said leases with any other valid and subsisting oil and gas lease or leases owned by the undersigned.

Now, Therefore, in pursuance of the authority granted the undersigned under and by virtue of the provisions of the above described leases the undersigned hereby consolidates and unitizes the above described leases, insofar as the same cover all of Section 2, Township 5 North, Range 18 ECM, Texas County, Oklahoma, containing six hundred and forty (640) acres, more or less, into a single unit, for the purpose of developing and operating the same for the production of natural gas and/or other minerals.

IN WITNESS WHEREOF, the undersigned has caused the above and foregoing instrument to be executed this 22nd day of January, 1951.

(SEAL) HUGOTON-PLAINS GAS AND OIL COMPANY

By J. SIMM FLUOR
President

ATTEST:
? ? ?
Secretary

IN THE DISTRICT COURT WITHIN AND FOR
TEXAS COUNTY, OKLAHOMA

No. 10,596

WESTHOMA OIL COMPANY, a corporation, *Plaintiff*,

v.

B. C. RIST and GLADYS RIST, *Defendants*.

ANSWER

Come now defendants and for answer to plaintiff's petition allege and state:

1. Defendants deny each and every material allegation of the petition prejudicial to defendants, except those hereinafter specifically admitted.

2. Defendants admit the allegations of paragraphs 1 and 2 of the petition, as amended.

3. Defendants admit the issuance of the Oklahoma Corporation Commission Order No. 17,867, to which reference is made in paragraph 3 of the petition, and which is attached thereto.

4. Defendants admit the execution of Exhibit "B" attached to plaintiff's petition, and the execution of the September 20, 1944 agreement referred to therein, copy of which is attached to the petition.

5. Defendants admit and allege that plaintiff does not now own and has never owned any interest in the leasehold estate created by Exhibit "A" attached to the petition to the extent that it covers that portion of the Southeast Quarter of Section 2, Township 5, North, Range 18 ECM, situated above sea level.

6. Defendants admit and allege that at, from and after the execution of Exhibit "B" attached to the petition, the lease was divided horizontally into two parts, one covering that part of the quarter section consisting of horizons above sea level and one covering that part of the quarter section consisting of horizons below sea level.

7. Defendants admit the execution and recording of Exhibit "C" attached to the petition, and admit and allege that when *Hugoton Plains Oil and Gas Company* executed and filed for record the same, it did not own a valid and subsisting lease covering that part of said quarter section situated below sea level, and deny that that part of the leasehold estate not owned by said company but owned by plaintiff was included in such consolidated leasehold estate.

8. Defendants admit and allege that there has been no production of oil *or gas* from said quarter section. Defendants specifically deny that the leasehold interest claimed by plaintiff, on that part of the land situated below sea level, was ever unitized with any other leasehold estate and deny that there has ever been any unit production of gas with respect thereto.

9. Defendants admit that, during the primary term of the lease, a producing gas well was completed on lands other than the leased premises involved herein and to which plaintiff claims a leasehold interest.

10. Defendants admit that they claim that the said oil and gas lease has terminated, and is no longer of any force or effect as to all horizons, depths and strata below sea level.

WHEREFORE, defendants pray that plaintiff take naught by its action herein and that they have judgment against plaintiff for their costs herein.

FLEESON, GOOING, COULSON & KITCH
Wichita, Kansas

LIGHT & YOXALL
Liberal, Kansas

TRYON, SWEET & HENSLEY
Guymon, Oklahoma

By

Attorneys for Defendants

APPENDIX E (ATTACHMENT 2)

Petition and Answer in Peerless Oil & Gas Co. et al. v. Ernest L. Carpenter and Blanche M. Carpenter, No. 10597 (District Court, Texas County, Oklahoma)

IN THE DISTRICT COURT WITHIN AND FOR
TEXAS COUNTY, OKLAHOMA

No. 10,597

PEERLESS OIL AND GAS COMPANY, a corporation, JAKE L. HAMON, and WESTHOMA OIL COMPANY, a corporation,
Plaintiffs,

v.

ERNEST L. CARPENTER, and BLANCH M. CARPENTER,
Defendants.

PETITION

Come now the Plaintiffs above named and, for their cause of action against the Defendants above named, allege and state:

1. Each of the Plaintiffs, Peerless Oil and Gas Company and Westhoma Oil Company, is a corporation organized under the laws of the State of Delaware, and each of them has its principal place of business in San Antonio, Texas, and at all times herein referred to each of them has been duly authorized to do business in the State of Oklahoma. The Plaintiff, Jake L. Hamon, is a citizen and resident of the State of Texas. The Defendants are citizens and residents of the State of Oklahoma, residing in Texas County, Oklahoma.

2. On January 7, 1943, Louis B. Carpenter and his wife, Mary E. Carpenter, who then were the owners in fee simple of the following described property situated in Texas County, Oklahoma, to wit:

The Northwest Quarter (NW/4) of Section 34, Township 6 North, Range 18 ECM,

executed and delivered to the Plaintiff, Peerless Oil and Gas Company, an oil and gas lease covering said land above described and other lands. A true copy of said oil and gas lease is attached hereto as Exhibit "A", and is hereby made a part hereof. Thereafter the said Lessors, Louis B. Carpenter and Mary E. Carpenter, conveyed the said lands described above by Warranty Deed to the Defendant, Ernest L. Carpenter, whose wife is the Defendant, Blanch M. Carpenter.

3. Thereafter, on May 31, 1945, the Oklahoma Corporation Commission, pursuant to the applicable statute, issued its order No. 17867, establishing drilling and spacing units of 640 acres each for the development and production of natural gas from the Guymon-Hugoton Pool, a common source of supply of natural gas underlying an area in Texas County, Oklahoma, at a depth wholly above sea level. Said Section 34 constitutes one of such drilling and spacing units so established by said order.

4. Thereafter, on November 28, 1947, the said Plaintiff, Peerless Oil and Gas Company, duly assigned said oil and gas lease, in so far as the same covered and affected the said Northwest Quarter of said Section 34, to certain individuals, and on December 15, 1947, said individuals duly assigned said oil and gas lease to the Plaintiff, Westhoma Oil Company, in so far as the same covered and affected the said Northwest Quarter of said Section 34, "to the extent of the producing horizons which are situated below, and only below, sea level". A true copy of said assignment to the Plaintiff, Westhoma Oil Company, is attached hereto as Exhibit "B", and is hereby made a part hereof.

5. On December 15, 1947, said individuals duly assigned unto Plains Natural Gas Company, a corporation, all of their remaining interests in and to said oil and gas lease,

which said remaining interest was limited to those horizons situated above sea level and underlying the said Northwest Quarter of said Section 34.

6. Thereafter, on June 13, 1950, the said Plains Natural Gas Company, being then the owner also of oil and gas leases covering the South Half and the Northeast Quarter of said Section 34, executed a "Declaration of Consolidation of Oil and Gas Leases", pursuant to authority granted in all of the said oil and gas leases covering all of said Section 34. Said instrument thereafter was filed for record on June 30, 1950, by the said Plains Natural Gas Company in the office of the County Clerk of Texas County, Oklahoma. A true copy of said instrument is attached hereto as Exhibit "C", and is hereby made a part hereof.

7. Thereafter, on July 17, 1950, the said Plains Natural Gas Company drilled and completed a producing gas well in said Guymon-Hugoton Pool at a depth wholly above sea level and at a lawful location in the said Northwest Quarter of said Section 34. On said date all of said oil and gas leases covering all of said Section 34 were in full force and effect due to the timely and proper payment of all accrued drilling delay rentals provided for by said leases. Said well, upon completion, produced natural gas in paying quantities and has continued at all times thereafter to produce, and presently produces, natural gas in paying quantities. The Defendant, Ernest L. Carpenter, has been paid his proper proporitonate share of the royalty due to him upon such production.

8. Thereafter, by means assignments, the said interest of the said Plains Natural Gas Company in said oil and gas lease became vested in, and is now owned by, Hugoton Plains Gas and Oil Company, a corporation, and the said interest of the Plaintiff, Westhoma Oil Company, in said oil and gas lease became vested in, and is now owned jointly by the Plaintiffs, Peerless Oil and Gas Company and Jake L. Hamon, subject to an overriding royalty interest

therein which was reserved by the Plaintiff, Westhoma Oil Company.

9. By reason of all the foregoing said oil and gas lease, Exhibit "A" hereto, has remained, and presently continues, in full force and effect on the said Northwest Quarter of said Section 34 as to all depths, horizons and strata therein and thereunder, both above and below sea level. Notwithstanding the foregoing, the Defendants claim that said oil and gas lease has terminated, and no longer is of any force or effect, as to all depths, horizons and strata below sea level. Said claim by the Defendants constitutes a cloud upon the said oil and gas leasehold title of the Plaintiffs to all depths, horizons and strata below sea level underlying said Northwest Quarter of said Section 34. Said claim is unfounded and without right, and Plaintiffs have no adequate remedy at law.

Wherefore, Plaintiffs pray that they have judgment against the Defendants decreeing that said oil and gas lease is valid and subsisting as to all depths, horizons and strata, both above and below sea level, adjudging Plaintiffs to be the owners thereof as to all depths, horizons and strata below sea level, quieting and confirming Plaintiffs' title thereto, and barring and enjoining the Defendants and all persons claiming under them from asserting any claim or interest adverse to Plaintiffs' said oil and gas leasehold title, for Plaintiffs' costs herein expended, and for all other and further relief to which Plaintiffs in equity and good conscience may be entitled.

VINCENT DALE
Guymon, Oklahoma

COCHRAN, DUDLEY, FOWLER, RUCKS, BAKER & JOPLING

By
RICHARD W. FOWLER
1133 First National Building
Oklahoma City 2, Oklahoma

Attorneys for Plaintiff

Oil and Gas Mining Lease

This Agreement entered into this 7th day of January, 1943, by and between Louis B. Carpenter and wife, Mary E. Carpenter the undersigned, hereinafter called Lessor, whether one or more, and Peerless Oil and Gas Company, the undersigned, hereinafter called Lessee,

Witnesseth:

1. That lessor for and in consideration of the sum of One and No/100 Dollars, ($1.00) in hand paid, and of the covenants and agreements hereinafter contained, to be performed by lessee, have this day granted and leased and hereby grant and lease and let unto the lessee for the purpose of mining and operating for, and producing oil, gas and casinghead gas and gasoline from the hereinafter described premises, laying pipe lines, building tanks, storing oil, building power stations, rigs, derricks, slush pits, operating boilers, engines, stations, telephone lines and other structures and appliances to produce, transport, save, take care of and manufacture any and/or all such substances and for housing and boarding employees, the following described property situated in the State of Oklahoma, County of Texas, to-wit:

* * * * * * * * * * *

9. Lessee is expressly granted the right and privilege (which lessee may exercise at any time either before or after production has been obtained upon this premises or any premises consolidated herewith) to consolidate the leasehold estate, created by the execution and delivery of this lease, or any part or parts thereof, with the mineral leasehold estate or estates or parts thereof in any other lands upon which this lessee shall at the time own valid and subsisting lease or leases, located and situated near the property described herein, provided that any resulting consolidated estate shall not cover and include more than 2560 acres. Any consolidation of estates herein authorized shall

be consummated when the owner of the leasehold estate created hereby shall have executed and filed for record in the office of the County Clerk of the county or counties in which the same or any part thereof is located, a statement designating and describing such properties so consolidated and declaring lessee's intention to consolidate same, and in the event of any such consolidation, it is agreed:

(a) This lease shall thereafter continue in full force and effect for all purposes as to the premises covered hereby and included in any such consolidation of estates, so long as gas is or can be produced from any well located on any part of the land included in such consolidation (whether on lands covered hereby or not), except as herein otherwise provided, or so long as oil is or can be produced from any well drilled on a portion of the land covered hereby.

(b) During the primary term hereof and until production has been obtained, from this or the consolidated leasehold, the lessee shall be privileged to pay the annual delay rentals stipulated herein on any part of this leasehold included in a consolidation of estates or not so included, and thereby continue this lease in full force and effect as to the part or portions thereof upon which rentals are so paid; but this lease, insofar as it covers any tract or tracts not included in a consolidation of estates held in force by production as herein provided, shall terminate at the expiration of the primary term hereof, unless oil, gas, or other minerals is or can be produced from a well or wells thereon.

. . . . . .

In Witness Whereof, We sign the day and year first above written.

Louis B. Carpenter
Mary E. Carpenter

ASSIGNMENT OF OIL AND GAS LEASES

KNOW ALL MEN BY THESE PRESENTS:

That Vernon Taylor Jr., of Bexor County, Texas, Ruth Taylor Campbell, of Montgomery County, Alabama, The Sara H. Taylor Trust (Vernon F. Taylor Trustee thereof), and The James C. Taylor Trust (Vernon F. Taylor Trustee thereof) hereinafter called assignors, in consideration of Ten ($10.00) Dollars and other good and valuable consideration to them passing, the receipt of which is hereby acknowledged, do hereby transfer, assign and convey unto Westhoma Oil Company, a corporation, duly incorporated and existing under the laws of the State of Delaware and having authority to do business both in the State of Oklahoma and in the State of Kansas, hereinafter called assignee, all of the assignors' right, title and interest in and to the oil and gas leases insofar as they cover the hereinafter described lands to the extent of the producing horizons which are situated *below, and only below*, sea level. Said leases are described below by reference to the dates thereof, name of lessors, name of lessees, county and state in which the property is located, description of the land, and the book and page of the recording thereof, respectively, as follows, to-wit:

REVENUE STAMPS $1.50 affixed.

TEXAS COUNTY, OKLAHOMA

OKL-80 Date: January 7, 1943

Lessor: Louis B. Carpenter and wife, Mary E. Carpenter

Lessee: Peerless Oil & Gas Company

Description: NW/4 Section 34-6N-18ECM

Recorded: Book 233, Page 322

Expiration: January 7, 1953

Acreage: 160 Acres

(Together with other leases)

and being leasehold interests heretofore transferred and assigned to the assignors by Peerless Oil & Gas Company.

This transfer and assignment, however, is pursuant to the terms and provisions as set forth in a written agreement between Peerless Oil & Gas Company and these assignors dated September 20, 1944.

To have and to hold the same unto the said assignee, its successors and assigns, according to the terms and conditions of said leases.

The effective date of this instrument is January 1, 1948, at seven o'clock A.M.

Witness the hands of the assignors, this 15th day of December, 1947.

VERNON TAYLOR, JR.
Vernon Taylor, Jr.

RUTH TAYLOR CAMPBELL
Ruth Taylor Campbell

VERNON F. TAYLOR
Vernon F. Taylor, as Trustee for
The Sara H. Taylor Trust

VERNON F. TAYLOR
Vernon F. Taylor, as Trustee for
The James C. Taylor Trust

STATE OF TEXAS
COUNTY OF BEXAR

Before me, the undersigned, a Notary Public, in and for said County and State, on this 15th day of December, 1947, personally appeared Vernon Taylor, Jr., and Ruth Taylor Campbell, to me known to be the identical persons who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein

set forth. Given under my hand and seal the day and year last above written.

FLORENCE COWDRY
Notary Public in and for Bexar County, Texas

Florence Cowdry
Notary Public, Bexar County, Texas

SEAL
My commission expires:
6/1/49

STATE OF TEXAS
COUNTY OF BEXAR

Before me, the undersigned, a Notary Public, in and for said county and state, on this 15th day of December, 1947, personally appeared Vernon F. Taylor, Trustee under The Sara H. Taylor Trust, to me known to be the identical person who executed the within and foregoing instrument and acknowledged to me that he executed the same as trustee of said estate as his free and voluntary act and deed for the uses and purposes therein set forth. Given under my hand and seal the day and year last above written.

FLORENCE COWDRY
Notary Public in and for Bexar County, Texas

Florence Cowdry,
Notary Public in and for
Bexar County, Texas

SEAL
My commission expires:
6/1/49

Declaration of Consolidation Of Oil and Gas Leases

Know All Men by These Presents:

That Plains Natural Gas Company, a Corporation, is the owner of the following described valid and subsisting oil and gas leases:

1. From Louis B. Carpenter and wife, Mary E. Carpenter, lessors, to Peerless Oil and Gas Company, lessee, dated January 7, 1943, recorded in Book 233, Page 322 of the records of Texas County, Oklahoma, covering, among other lands, the following described land in Texas County, Oklahoma:

> Northwest quarter of Section 34, Township 6 North, Range 18 ECM, containing 160 acres, more or less.

2. From Otto G. Lutes and Florence Lutes, his wife, lessors, to Peerless Oil and Gas Company, lessee, dated January 8, 1943, recorded in Book 233, Page 296 of the records of Texas County, Oklahoma, covering the following described tract of land in Texas County, Oklahoma:

> Northeast quarter of Section 34, Township 6 North, Range 18 ECM, containing 160 acres, more or less.

3. From Herbert Gilmore and his wife, Laura A. Gilmore, lessors, to Peerless Oil and Gas Company, lessee, dated May 8, 1942, recorded in Book 233, Page 108 of the records of Texas County, Oklahoma, covering, among other lands, the following described land in Texas County, Oklahoma:

> Southeast quarter of Section 34, Township 6 North, Range 18 ECM, containing 160 acres, more or less.

4. From Herman Ewert and wife, Margaret Ewert, lessors, to Peerless Oil and Gas Company, lessee, dated April 2, 1943, recorded in Book 210, Page 220 of the records of Texas County, Oklahoma, covering the following described land in Texas County, Oklahoma:

Southwest quarter of Section 34, Township 6 North, Range 18 ECM, containing 160 acres, more or less.

Under and by virtue of the provisions of the above described leases, the undersigned is granted the privilege, for the purpose of forming a unit of not to exceed six hundred forty (640) acres, of consolidating and unitizing each of said leases with any other valid and subsisting oil and gas lease or leases owned by the undersigned.

Now, Therefore, in pursuance of the authority granted the undersigned under and by virtue of the provisions of the above described leases the undersigned hereby consolidates and unitizes the above described leases, insofar as the same cover all of Section 34, Township 6 North, Range 18 ECM, containing 640 acres, more or less, into a single unit, for the purpose of developing and operating the same for the production of natural gas and/or other minerals.

In Witness, Whereof, the undersigned has caused the above and foregoing instrument to be executed this 13th day of June, 1950.

Plains Natural Gas Company
s/ By: Vernon Taylor, Jr., *President*

(SEAL)
Attest:

s/ W. B. Chapman
Assistant Secretary

IN THE DISTRICT COURT WITHIN AND FOR
TEXAS COUNTY, OKLAHOMA

No. 10,597

PEERLESS OIL AND GAS COMPANY, a corporation, JAKE L. HAMON, and WESTHOMA OIL COMPANY, a corporation,
Plaintiffs,

vs.

ERNEST L. CARPENTER and BLANCH M. CARPENTER,
Defendants.

ANSWER

Come now defendants and for answer to plaintiffs' petition allege and state:

1. Defendants deny each and every material allegation of the petition prejudicial to defendants, except those hereinafter specifically admitted.

2. Defendants admit the allegations of paragraphs 1 and 2 of the petition, as amended.

3. Defendants admit the issuance of the Oklahoma Corporation Commission Order No. 17,867, to which reference is made in paragraph 3 of the petition, and which is attached thereto.

4. Defendants admit the execution of Exhibit "B" attached to plaintiffs' petition, and the execution of the September 20, 1944 agreement referred to therein, copy of which is attached to the petition.

5. Defendants admit and allege that plaintiffs do not now own and have never owned any interest in the leasehold estate created by Exhibit "A" attached to the petition to the extent that it covers that portion of the Northwest Quarter of Section 34, Township 6 North, Range 18 ECM, situated above sea level.

6. Defendants admit and allege that at, from and after the execution of Exhibit "B" attached to the petition, the lease was divided horizontally into two parts, one covering that part of the quarter section consisting of horizons above

sea level and one covering that part of the quarter section consisting of horizons below sea level.

7. Defendants admit the execution and recording of Exhibit "C" attached to the petition, and admit and allege that when Plains Natural Gas Company executed and filed for record the same, it did not own a valid and subsisting lease covering that part of said quarter section situated below sea level, and deny that that part of the leasehold estate not owned by said company but owned by plaintiffs was included in such consolidated leasehold estate.

8. Defendants admit and allege that there has been no production of oil from said quarter section. Defendants specifically deny that the leasehold interest claimed by plaintiffs, on that part of the land situated below sea level, was ever unitized with any other leasehold estate and deny that there has ever been any unit production of gas with respect thereto.

9. Defendants admit that, during the primary term of the lease, a producing gas well was completed on lands other than the leased premises involved herein and to which plaintiffs claim a leasehold interest.

10. Defendants admit that they claim that the said oil and gas lease has terminated, and is no longer of any force or effect as to all horizons, depths and strata below sea level.

WHEREFORE, defendants pray that plaintiffs take naught by its action herein and that they have judgment against plaintiffs for their costs herein.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 522

THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA AND THE HONORABLE STEPHEN S. CHANDLER, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, *Petitioners*,

vs.

OTTO G. LUTES, FLORENCE LUTES, B. B. FRENCH, JEWELL FRENCH, L. O. HOOD, MYRTLE HOOD, D. M. BROWER, MILDRED BROWER, CARL R. STALCUP, MILLIE L. STALCUP, IDA F. WRAY, E. F. BRUCE, GERALDINE BRUCE, J. J. FRENCH, THESIA FRENCH, RIFFE WESLEY, HAZEL RIFFE, OSTBY S. AUSTIN, ETHEL AUSTIN, JESSIE E. BROWN, D. L. HAMILTON, HELEN HAMILTON, HARRY G. RIFFE, MYRTLE RIFFE, G. F. PRICE, FLORA LEE PRICE, LEWIS B. CARPENTER, MARY E. CARPENTER, E. L. CARPENTER AND BLANCHE M. CARPENTER, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 522

THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA AND THE HONORABLE STEPHEN S. CHANDLER, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, *Petitioners*,

vs.

OTTO G. LUTES, FLORENCE LUTES, B. B. FRENCH, JEWELL FRENCH, L. O. HOOD, MYRTLE HOOD, D. M. BROWER, MILDRED BROWER, CARL R. STALCUP, MILLIE L. STALCUP, IDA F. WRAY, E. F. BRUCE, GERALDINE BRUCE, J. J. FRENCH, THESIA FRENCH, RIFFE WESLEY, HAZEL RIFFE, OSTBY S. AUSTIN, ETHEL AUSTIN, JESSIE E. BROWN, D. L. HAMILTON, HELEN HAMILTON, HARRY G. RIFFE, MYRTLE RIFFE, G. F. PRICE, FLORA LEE PRICE, LEWIS B. CARPENTER, MARY E. CARPENTER, E. L. CARPENTER AND BLANCHE M. CARPENTER, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF IN OPPOSITION

OPINIONS BELOW

These cases involve a pattern of conduct originating in *Rogers* v. *Westhoma*, 291 F.2d 726, rehearing denied 291

F.2d 732. Accordingly, the court's opinions in those cases are printed herein, Appendix A, p. A1. The United States District Court of Oklahoma for the Western District of Oklahoma at first refused to stay respondents' cases in an unreported letter order, which is printed herein, Appendix B, p. A17. The proceedings in the District Court Within and For Texas County, Oklahoma, printed in the Petition for Writ of Certiorari, were not presented to the Court of Appeals or made a part of the record before it. (See opinion of the Court of Appeals denying a motion to modify its opinion found at page 21a of the Appendix to the Petition for Certiorari.)

QUESTION PRESENTED

Respondents believe the question to be: Whether the United States Court of Appeals abuses its discretion to issue a writ of mandamus under 28 U.S.C. 1651(a) requiring a trial court within its jurisdiction to proceed and determine diversity cases properly before it where (1) none of the exceptional circumstances within which a trial court has discretion to invoke the "abstention doctrine" are present, and (2) a stay has been granted by the trial court at the request of the Federal court defendant based solely upon the existence of subsequently filed state litigation created by such defendant in a court of concurrent jurisdiction for the sole purpose of thwarting federal jurisdiction as a part of a continued and designed strategy of forum-shopping.[1]

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1. Respondents respectfully suggest that the footnote attached to the question as presented by petitioners (p. 4 of Petition) takes all meaning out of the question as stated in the text. Petitioners rely upon the very delay, of which respondents complain, which has been caused by the trial court stay, and which is continuing during the pendency of these proceedings, encouraging petitioners now repeatedly to assert throughout its Petition that a decision of the Supreme Court of Oklahoma is "imminent".

STATUTES INVOLVED

While there are no statutes, either Federal or State, which are pertinent to the merits of respondents' cases as presented in the trial court, respondents rely on the diversity statute, 28 U.S.C., Section 1332(a), as giving them the right to a trial in the district court and on the All Writs Act, 28 U.S.C., Section 1651(a), as affording them grounds for relief from the arbitrary trial court action depriving them of that right.

The applicable portions of the diversity statute, 28 U.S.C., Section 1332(a), provides, in part, as follows:

> "(a) The district courts shall have original jurisdiction of all actions where the matter in controversy . . . is between—
>
> (1) citizens of different states; . . ."

28 U.S.C., Section 1651(a), under which relief was granted by the Court of Appeals, provides in part:

> "(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

In August, 1961, respondents Otto G. Lutes and Florence Lutes, his wife, owners of a 160-acre farm tract in Texas County, Oklahoma, filed in the United States District Court for the Western District of Oklahoma an action against Westhoma Oil Company and others, who claimed the continued existence of an oil and gas lease contract owned by them insofar as it covered part of the land. (The complaint is set out in Appendix C, p. A19.)

Jurisdiction was admittedly properly based upon diversity of citizenship.

The contract was executed in January of 1943, and its primary ten year term expired in January of 1953. There has been at no time any oil or gas production or operations of any kind or character on that part of the land as to which defendants claim to have leasehold contractual rights. Defendants having, however, persisted in their claims long beyond the primary term, thus preventing development of such land by others, Mr. and Mrs. Lutes filed the action for a judicial determination that the lease contract interest of defendants had expired by its own terms.

Subsequently, the remainder of the respondents (in most instances also husband and wife), the owners of other 160-acre farm tracts in the same area, on various dates also filed similar but separate diversity cases against the same defendants in the same court, seeking similar relief.

The defendants, in each instance, claim that their contractual rights have been perpetuated beyond the primary 10-year term of the contract by reason of production secured by separate and other owners by assignment of the contract insofar and only insofar as it covered other parts of the respondents' lands.

As to such respective claims, the cases involve a determination of the *intent* of the parties to the contract as applied to existing factual situations.

The express contract provisions (from which such intent must be determined) and such existing factual situations are admittedly substantially identical to those in *Rogers* v. *Westhoma*, 291 F.2d 726, rehearing denied 291 F.2d 732 (10th Cir., 1961), which is reproduced in Appendix "A" herein pp. A1 to A16.

In those previous cases a number of landowners, similarly situated to respondents here, beginning about four years ago commenced in the state courts of Kansas similar separate actions against Westhoma and others. When such previous cases were filed, Westhoma and its co-defendants, not desiring to have the cases decided in state court, and not then believing that the cases involved "a basic problem of state policy beyond the special competence of the federal judiciary" (as now claimed, p. 8 of Petition) removed them to the United States District Court for the District of Kansas.[1] After three years of protracted and hard-fought litigation, in which twenty-eight prominent Oklahoma lawyers representing the interests of oil and gas lessees participated as amici curiae,[2] the landowners prevailed. As the result, their lands, by judicial decree, became free of the claims of Westhoma *et al.*, permitting such landowners to seek development from others.

But, in the face of the result[3] thus obtained in the forum of its choice in *Rogers* v. *Westhoma*, Westhoma and its co-owners failed to relinquish their claim as to that portion of a leasehold block which extended south across the Kansas-Oklahoma border. Nor did Westhoma and its associates, during the three-year pendency of the *Rogers* cases, file any suit to establish any asserted continuing contractual rights in such south portion of the block. These landowner actions resulted.

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1. 24 of the 27 cases involved in the Rogers cases were so removed. After and in the face of such successful removal by Westhoma of the 24 cases, the other 3 cases were filed by plaintiffs directly in federal court so that they could all be decided in the same forum. See *Rogers* v. *Westhoma, supra* (App. A, p. A1), and the opinion of the court below (App. A to Petition for Certiorari, pp. 2a-3a).

2. *Rogers* v. *Westhoma, supra* (App. A, p. A1).

3. An "accident of Federal jurisdiction" (p. 9 of Petition) procured by Westhoma itself.

As stated above, the additional actions of the respondents were brought by them in Westhoma's original choice of forum: the federal court. But Westhoma, having lost the removed suits in its chosen forum, suddenly decided that it might be better off in state court after all. So, after respondents began filing the additional various federal court cases, Westhoma found other landowners, residents of Oklahoma, against whom non-removable cases could be filed in the District Court within and for Texas County, Oklahoma. It there filed, as plaintiff, separate non-removable state court cases against such other landowners involving substantially the same fact situations as were involved in *Rogers* v. *Westhoma* and in the federal court cases previously filed by respondents.[1]

Having again successfully shopped for a new forum, Westhoma filed motions in respondents' federal court cases requesting that respondents' cases be stayed pending determination of its state court cases subsequently filed against others.[2]

At first, and after all state cases were filed, and on October 18, 1961, the trial court refused to condone such forum-shopping, explaining:

"The cases filed by defendants in the District Court of Texas County, Oklahoma were instituted sub-

---

1. Respondents' separate actions were filed beginning August 30, 1961. Westhoma's first non-removable state actions were filed two weeks later, on September 14, 1961.

2. Westhoma's motions for stay were filed September 25, 1962. In such motions it stated that it intended to file additional non-removable cases. Westhoma later did file two such additional state court cases on October 12, 1961. One of these was against respondents Mr. and Mrs. Ostby S. Austin, who had previously (October 11) filed an action against Westhoma in federal court. With this single exception, none of respondents are parties to any state court cases.

> sequent to the suits in this court, and it is impossible to ascertain how long it will be before a final decision will be rendered in those cases in state court. As a general rule it takes much longer for a case to be finally decided in the state courts of this state than it does for a case to reach final decision in the federal courts sitting here. Furthermore, the defendants could have filed their suits in the courts of the State of Oklahoma any time after the cases were filed in Kansas which resulted in the decisions of Rogers v. Westhoma, 291 F.2d 726, but they did not choose to do so until the instant suits were filed. Although the defendants insist that the questions involved herein should be decided by a state court, the defendant Westhoma itself removed the Kansas cases to federal court from state court. Under the circumstances, it would not be fair or right for this court to stay these actions pending the outcome of the state court suits and thus enable the defendants to choose the forum when their apparent purpose, in view of Westhoma's choice of a federal forum in Kansas, is to speculate on a different decision from another court of concurrent jurisdiction. This is true particularly where the remedy in this court undoubtedly will result in a final determination in a fraction of the time necessary to obtain one in the state forum." (App. B, p. A18).

At the same time, the court consolidated the then-pending federal court cases for purposes of discovery, pre-trial and trial.

Defendants answered; pre-trial discovery was completed; a pre-trial conference was held on February 14, 1962, with resulting pre-trial order; counsel entered into a written stipulation concerning most of the factual questions and announced that they were ready for trial.

At the February, 1962, pre-trial conference counsel for defendants requested that their motions to stay be reconsidered.

By letter dated March 28, 1962, the trial judge reversed his decision and stayed all of respondents' cases, stating:

> "Upon consideration of defendants' motions to stay, I have come to the conclusion that under the doctrine of abstention and in the interest of comity between state and federal courts, I must exercise the discretion granted me by staying the proceedings in these cases until the question involved herein has been decided in the cases now pending in the courts of the State of Oklahoma, and decision thereon has become final. It is so ordered." (App. B to Petition, p. 9a).

This reversal of position occurred six months after the trial court's refusal to stay, and six weeks after counsel had announced they were ready for trial.

This mandamus proceeding was thereafter initiated on May 18, 1962, seeking to vacate the stay order to the end that respondents' cases could be heard and determined.[1]

After full hearing on briefs and oral arguments, in which the petitioners here appeared by and through counsel for defendant Westhoma and others (as they do in this court), the writ was granted on August 2, 1962, pursuant to written opinion, and the district court was directed to vacate its stay order and proceed with and determinate the causes. (Appendix A to Petition for Certiorari p. 1a).

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1. While these respondents' cases were stayed and at the time their mandamus proceedings were pending, and on June 13, 1962, the state trial judge entered judgment without opinion, in two state cases involving other landowners, the journal entry being filed July 2, 1962. The judgment shows no more than that the leases had not terminated as to the land in question. (See opinion of the Court below denying motion to modify opinion, p. 21a of Petition for Certiorari.)

Late in August, there was filed, on behalf of petitioners here, a motion to modify the opinion of the Court of Appeals, which was denied on September 11, 1962, pursuant to another opinion of the Court of Appeals. (Appendix D to Petition for Certiorari, p. 21a).

The cases were, by the trial court, set for trial in the middle of September, 1962, but petitioners having successfully sought stays of the issuance of the mandate of the Court of Appeals, pending the petition for writ of certiorari, the cases were taken off the trial docket.

Successive stays were granted by the Court of Appeals, the last stay extending until October 15, 1962, conditioned on filing a petition for writ of certiorari by that time.

The opinion of the court below (Appendix A, p. A1) sets out additional admitted facts germane to these proceedings as follows: the pending cases, both federal and state, present the same fact situation and the same lease form as were presented in *Rogers* v. *Westhoma;* the decisions in *Rogers* v. *Westhoma* were not based upon any Kansas statute or decision; there is no Oklahoma statute requiring or justifying a different decision; the Kansas and Oklahoma rules of oil and gas lease construction do not differ in any pertinent regards; Westhoma bluntly contends that the decision in *Rogers* v. *Westhoma* was wrong even under Kansas law; the issues do not present any federal or state constitutional or statutory questions; no public officials will be affected by the result. Petitioners stated in open court before the Court of Appeals that neither the decision in *Rogers* v. *Westhoma* nor the state court decisions will *assuredly* control the federal court cases which were stayed. (See opinion of Court of Appeals denying motion to modify, Appendix D to Petition for Certiorari, p. 21a.)

SUMMARY OF ARGUMENT

As clearly shown by the opinion of the Court of Appeals, its decision was obviously necessary under the All Writs Act, 28 U.S.C., Section 1651(a), to prevent a clear case of forum-shopping, and judicial abdication inconsistent with the proper administration of justice in any court. No federal questions of substance not heretofore determined are involved.

The Court of Appeals acted strictly in accord with applicable decisions of this court. *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185 (1959); *Meredith* v. *Winter Haven*, 320 U.S. 228 (1943); *McClellan* v. *Carland*, 217 U.S. 280 (1910). See also *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), and other cases cited in the opinion of the Court of Appeals (Appendix A to Petition, p. 6a).

In so doing it implemented the Federal policy favoring conformity in diversity cases. *King* v. *United Commercial Travelers*, 333 U.S. 153 (1948).

The decision is in harmony with *Mottolese* v. *Kaufman*, 176 F.2d 301 (2d Cir., 1949), and *Beiersdorf & Co.* v. *McGohey*, 187 F.2d 14 (2d Cir., 1951), upon which petitioners solely rely to create conflict among Circuits. To the extent they are similar, those cases also effectively prevented forum-shopping, the state cases there having been filed first.

Respondents are entitled to trial and not the delay contemplated by petitioners' reliance on *Brillhart* v. *Excess Ins. Co. of America*, 316 U.S. 491 (1942), which has no applicability to these proceedings, the trial court having twice fully explained its actions.

ARGUMENT AND AUTHORITIES

In issuing its writ the Court of Appeals was only doing what was obviously necessary under 28 U.S.C., Section 1651(a), in the light of aggravated circumstances occurring over a period of years with which it was peculiarly familiar. This is apparent from the Court's opinion. Accordingly, no federal questions of substance not heretofore determined are involved.

In so doing, the Court of Appeals acted strictly in accord with applicable decisions of this Court. *County of Allegheny* v. *Frank Mashuda*, 360 U.S. 185 (1959); *Meredith* v. *Winter Haven*, 320 U.S. 228 (1943); *McClellan* v. *Carland*, 217 U.S. 280 (1910). See also *La Buy* v. *Howes Leather Co.*, 352 U.S. 249 (1957), and other cases cited in the opinion of the Court of Appeals (Appendix A to Petition, p. 6a).

When diversity jurisdiction was invoked by them, respondents were entitled to "that promptness of decision which in all judicial actions is one of the elements of justice", *County of Allegheny* v. *Frank Mashuda Co.*, *supra*, pp. 196-197.[1] The doctrine of abstention, under which the trial court purported to act, is an "extraordinary and narrow" exception and abdication of the obligation to decide cases can be justified only in "exceptional circumstances". *County of Allegheny* v. *Frank Mashuda Co.*, *supra*, pp. 188-189.

While admittedly the cases in which the trial court may so exercise its discretion are not subject to mathematical delineation, they must fall within some exceptional class

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1. Quoting from *Forsyth* v. *Hammond*, 166 U.S. 506, 513.

based upon "some recognized public policy or defined principle", *Meredith* v. *Winter Haven, supra*, p. 234.

The deliberate and calculated strategy of speculating on different decisions in different courts present here, having the sole effect of pitting court against court, and expedition against delay certainly does not fall within any such recognized public policy or defined principle.

Specifically, trial of respondents' cases would not "create needless friction by unnecessarily enjoining state officials from executing domestic policies"[1] as was present in *Arizona Public Service Comm.* v. *Southern Ry. Co.*, 341 U.S. 341 (1951), relied upon by petitioners. Nor does the case present a disputed interpretation of a state statute involving sovereign rights of the state as was present in *Louisiana Power and Light Co.* v. *Thibodaux*, 360 U.S. 25 (1959), upon which petitioners also rely.[2] Nor do these cases involve the exercise of jurisdiction by the federal court which "would disrupt a state administrative process",[3] as in *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), cited by petitioners. Nor do they present a "federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law"[4] as was found in *Railroad Comm. of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941), also relied upon by petitioners.

Nor do these cases involve the summary jurisdiction of the bankruptcy court to determine unsettled basic ques-

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1. *County of Allegheny* v. *Frank Mashuda Co., supra*, p. 189.

2. In addition, there the trial judge himself initiated the stay proceedings, "not at all in response to any alleged attempt" by a party to delay the proceedings, as present here. See footnote 2, p. 27 of opinion.

3. *County of Allegheny* v. *Frank Mashuda Co., supra*, p. 189.

4. *Ibid.*

tions of state land law involving "instruments of conveyance" as was found in *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478, 484 (1940), upon which petitioners principally rely.

In order to make that case appear to apply here, the petitioners found it necessary to paraphrase[1] the holding there in such a way as to make it directly inconsistent with the later holding of this court, specifically dealing with diversity jurisdiction, in *Meredith* v. *Winter Haven, supra*:

> "When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act." (pp. 234-5) (See also that portion of the opinion quoted by the Court of Appeals, Appendix A to Petition, p. 6a)

These cases simply involve the expressed intent of the parties to an unusual lease contract[2] as applied to factual situations. In the sense used by petitioners in their paraphrase contract rights are always "private interests in local property".[3]

Nor does the opinion of the Court of Appeals ignore the federal policy favoring conformity in diversity cases, as enunciated in *Klaxton Co.* v. *Stentor Electric Mfg. Co.*

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1. The paraphrase is found in the first full paragraph of paragraph 9 of the petition. In quoting *Magnolia*, petitioners also omit, without indicating the omission, language describing the decisional conflict which resulted in the grant of certiorari. See *Magnolia* v. *Thompson, supra*, pp. 484, 481.

2. An oil and gas lease is a contract. See for example, *Beatty* v. *Baxter*, 208 Okla. 686, 258 P.2d 626, 628 (1953).

3. Oil and gas leases are personal property and not real property. See *State* v. *Shamblin*, 185 Okla. 126, 129, 90 P.2d 1053, 1055 (1939).

313 U.S. 487 (1941), and other cases on which petitioners rely.[1] Rather the decision implements that policy, which contemplates the exercise, not the abdication, of the trial court's jurisdiction. *King* v. *United Commercial Travelers*, 333 U.S. 153 (1948).[2]

Basically, the question before the Court of Appeals was whether the trial court may be permitted a wide and uncontrolled discretion to pick and choose the cases involving questions it desires to hear and those it would prefer to have decided by the Supreme Court of the state while federal litigants wait. To permit the federal trial court to stay cases such as these, involving only the interpretation of a contract because an identical contract had not been interpreted by the Supreme Court of the state would have had such effect, with a resultant encouragement of forum-shopping and jockeying for position in various courts. It

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1. Petitioners' concern for state law and for the avoidance of intrusion by the Federal judiciary into matters within the special competence of the state (p. 6) rings hollow in view of Westhoma's original invitation of such "intrusion" in the *Rogers* cases, coupled with its admission that *Rogers* was not based upon any peculiar state statute or decision, that there is no Oklahoma statute requiring or even justifying a different decision, and that Kansas and Oklahoma rules of oil and gas lease construction, which are controlling, do not differ in any pertinent regard. Westhoma desires a stay so that the Oklahoma Supreme Court may, in effect, exercise an appellate review of the decision of the Court of Appeals in *Rogers*. But the Supreme Court of the United States is the tribunal created and existing for that purpose, and Westhoma did not seek to review the *Rogers* cases in this court, although it now bases its whole case on the theory that *Rogers* was wrong, regardless of what law is applicable.

2. The inference apparently sought to be created by petitioners that the federal trial court would be bound by a decision of the district court within and for Texas County, Oklahoma, is wholly unwarranted. *King* v. *United Commercial Travelers*, *supra*.

takes little imagination, in many instances, for a federal diversity defendant to find a single issue in a case which might be determinative and on which there is no state supreme court decision precisely governing. With a little more imagination, such defendant could then file subsequent non-removable state actions in a local forum of his own choosing and, based thereon, secure a Federal stay, thus effectively depriving Federal plaintiffs of what Congress intended to give them.

Respondents respectfully suggest that the scheduling of cases for trial, argument and decisions should not be governed by considerations which inevitably result from such actions, and that the due administration of justice does not contemplate or permit the artificial pressures on parties and counsel created thereby.

There is no showing that the decision of the Court of Appeals is in conflict with the decision of another Court of Appeals on the same matter. Indeed, the holding is fully in accord with the two Second Circuit cases on which petitioners rely. In both *Mottolese* v. *Kaufman*, 176 F.2d 301 (2d Cir., 1949) and *Beiersdorf & Co.* v. *McGohey*, 187 F.2d 14 (2d Cir., 1951), the state court cases were filed first and under circumstances where a state judgment would be either an estoppel or judgment in bar. To the extent that forum-shopping might have been present in such cases, the Second Circuit effectively prevented its abuse, just as the Tenth Circuit did here.

As to the petitioners' complaint that the lower court should be given another opportunity for a proper exercise of discretion, under the doctrine of *Brillhart* v. *Excess Ins. Co. of America*, 316 U.S. 491 (1942), the considerations mentioned by Justice Frankfurter have no applicability in these cases. The trial court has twice ruled on the matter, showed great familiarity with the circumstances, and de-

tailed in each instance its reasons. Under all of the facts, it was clearly right the first time and clearly wrong the second time. Respondents are entitled to a prompt trial, not to the further delay which could be the only result of petitioners' suggestion.

CONCLUSION

Respondents respectfully request that the petition for certiorari be denied.

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APPENDIX A

Opinions of United States Court of Appeals, Tenth Circuit, in Rogers v. Westhoma Oil Company, 291 F.2d 726 (1961), and on Rehearing Thereon, 291 F.2d 732.

J. P. ROGERS, Appellant,
vs.
WESTHOMA OIL COMPANY, a corporation, Appellee (two cases).

A. L. HILBIG, Appellant,
vs.
WESTHOMA OIL COMPANY, a corporation, Appellee.

Frank G. BOLES and Katie M. Boles, Appellants,
vs.
WESTHOMA OIL COMPANY, a corporation, Appellee (seven cases).

Blanche ENGEL, Appellant,
vs.
WESTHOMA OIL COMPANY, a corporation, Appellee (two cases).

Robert W. BAUGHMAN and Helen E. Baughman, his wife, Robert W. Baughman, Oliver S. Brown and Guy E. Spear, Executors and Trustees of the estate of John W.

Goldie B. DUBOIS,
Appellant,
vs.
WESTHOMA OIL COMPANY, a corporation,
Appellee.

Alice Marjorie McGILL and Sherley McGill, Appellants,
vs.
WESTHOMA OIL COMPANY, a corporation,
Appellee.

Paul R. PACKER,
Appellant,
vs.
WESTHOMA OIL COMPANY, a corporation,
Appellee.

Etta HAWK, Appellant,
vs.
WESTHOMA OIL COMPANY, a corporation,
Appellee.

Orville BELILE and Helena L. Belile, Appellants,
vs.
WESTHOMA OIL COM-

Baughman, deceased,
Appellants,
vs.
WESTHOMA OIL COMPANY, a corporation,
Appellee.

A. L. HILBIG and Esther Mae Hilbig, Appellants,
vs.
WESTHOMA OIL COMPANY, a corporation,
Appellee.

Lula DUNLAP, H. Harold Dunlap, Pearl Pitcher, Robert L. Dunlap, Josephine Light, Marilyn E. Dunlap, Catherine C. Dunlap and Charles M. Light, Jr.,
Appellants,
vs.
WESTHOMA OIL COMPANY, a corporation, Appellee (two cases).

Robert W. BAUGHMAN, Oliver Brown, and Guy E. Spear, Executors of the estate of Ella Baughman, deceased, Appellants,
vs.
WESTHOMA OIL COMPANY, a corporation,
Appellee.

PANY, a corporation,
Appellee.

N. G. MORLAN and Okel E. Morlan, Appellants,
vs.
WESTHOMA OIL COMPANY, a corporation,
Appellee.

E. D. HAMPTON and Flora Hampton, Appellants.
vs.
WESTHOMA OIL COMPANY, a corporation,
Appellee.

Merle W. BLOOM, Mildred L. Bloom, Nellie J. Vail, L. A. Bloom, Mildred C. Bloom, Edna E. Headrick, Roy W. Headrick, Wilma A. Keating and James B. Keating,
Appellants,
vs.
WESTHOMA OIL COMPANY, a Corporation, Appellee (two cases).

Joseph A. HANLIN, Francis B. Hanlin, Mary J. Brewington and Ray Brewington, Appellants,

vs.

WESTHOMA OIL COMPANY, a corporation, Appellee.

Nos. 6522-6548.

United States Court of Appeals
Tenth Circuit.

May 4, 1961.

Rehearing Denied July 11, 1961.

Dale M. Stucky and Wayne Coulson, Wichita, Kan. (Auburn Light, James R. Yoxall, Liberal, Kan., Paul R. Kitch, Donald R. Newkirk, Robert J. Hill, Gerrit H. Wormhoudt and Robert T. Cornwell, Wichita, Kan., and Light & Light, Liberal, Kan., Hugo T. Wedell and Homer V. Gooing, Wichita, Kan., of counsel, on the brief), for appellants.

John F. Eberhardt, Wichita, Kan. (George B. Powers, Carl T. Smith, Stuart R. Carter, Robert C. Foulston, Malcolm Miller, Robert N. Partridge, Robert M. Siefkin, Richard C. Harris and Gerald Sawatzky, Wichita, Kan., on the brief), for appellee.

Elmer W. Adams, Tulsa, Okl., Lynn Adams, Oklahoma City, Okl., G. D. Ashabranner, George H. Bowen, Cecil R. Buckles, Angus A. Davidson, Glenn R. Davis, J. Paul Greve, Howard H. Harris, Tulsa, Okl., Coleman Hayes, S. D. Holloway, Oklahoma City, Okl., Robert A. Huffman, Hawley C. Kerr, Tulsa, Okl., Gentry Lee, Bartlesville, Okl., William E. Lester, Tulsa, Okl., Richard R. Linn, Oklahoma City, Okl., James H. McGowan, Tulsa, Okl., R. O. Mason, L. G. Minter, Bartlesville, Okl., Robert W. Richards, Ok-

lahoma City, Okl., Richard P. Ryan, Tulsa, Okl., Nathan Scarritt, Enid, Okl., Norton Standeven, Oklahoma City, Okl., Leslie A. Thompson, H. B. Watson, Jr., Philip R. Wimbish, Tulsa, Okl., John W. Wolfe, Oklahoma City, Okl., and Wm. J. Zeman, Bartlesville, Okl., amici curiae.

Before MURRAH, Chief Judge, and BRATTON and BREITENSTEIN, Circuit Judges.

These 27 consolidated appeals are from separate judgments entered in declaratory judgment actions brought by lessors or their successors to determine whether the oil and gas leases involved had terminated as to all horizons below sea level at the expiration of their respective primary terms because of failure to obtain production. They present a common question of law bearing on similar and undisputed facts. Twenty-four of the actions were removed from Kansas state courts and three were filed originally in federal court. There is unquestioned diversity jurisdiction. The parties, agreeing that there were no factual issues, each moved for summary judgment and the lower court held that the leases had all been continued beyond their primary terms by gas production secured within those terms from horizons above sea level. The lessors have appealed.

The 27 leases cover land in the Hugoton Field, Seward County, Kansas, and were identical in form, differing only as to date, lessor or lessors, and land descriptions. Twenty-four were executed during 1941 and 1942 and three in 1944. Each was for a 10-year primary term. By mesne assignments, Plains Natural Gas Company (Plains) became the owner of the leases as to all horizons above sea level and appellee-defendant Westhoma Oil Company (Westhoma) became the owner of the leases as to all horizons below sea level. No question is raised as to the

validity of these assignments on the basis of horizontal divisions.

The Kansas Corporation Commission by proration order established 640 acres as the basis for computing allowables in the Hugoton Field.[1] In an appropriate manner, Plains acted to consolidate its holdings into 640-acre units. The statement accomplishing this purpose provided that:

> "[A] 11 producing horizons which are situated above and down to, but not below, the sea level, shall be deemed, treated and operated as a consolidated gas leasehold estate."

Within the primary term of each lease Plains secured commercial gas production from above-sea-level horizons on each of the consolidated units. As to 9 of the leases the producing well is on the leased land and as to 18 the well is located elsewhere on the unit involved. No production of oil or gas was obtained during the primary term from below-sea-level horizons.

Each lease contained a "thereafter" clause which will be discussed later. Ordinarily an oil and gas lease is extended beyond the primary term by a "thereafter" clause if a producing well is obtained at any location on the leased premises during the primary term.[2] None of the parties question the general rule that production from any part of a consolidated or pooled unit perpetuates all leases within the unit, even as to ununitized acreage, unless the leases

1. The Commission order is not set out in full in the record but it apparently affected only gas production from above-sea-level horizons. It is so treated by the parties.

2. *Cowman* v. *Phillips Petroleum Co.*, 142 Kan. 762, 51 P.2d 988, 991.

provide to the contrary.[3] Each lease in question also contains what is called a "Pugh clause"[4] which is designed to prohibit lease continuation beyond the primary term as to nonproducing areas not included within a productive unit.

The habendum clauses of the leases provide a term of 10 years and as long thereafter as oil or gas is produced from the premises "and as long as hereinafter otherwise provided in the event of consolidation."[5] The parties agree that the occurrence of production on or off the leased premises included within a unit makes no difference in the disposition of the controversy and that the "hereinafter otherwise provided" clause controls because there was consolidation. In these circumstances, this court is not concerned with what the situation might be in the absence of such an agreement.

The Kansas Supreme Court has established rules which govern the construction and application of oil and gas leases in that state. In *Tate* v. *Stanolind Oil & Gas Co.*, 172 Kan. 351, 240 P.2d 465, 468-469, it is said that the intent of the parties is the primary question; that reasonable rather than unreasonable interpretations are favored; that

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3. *Whitaker* v. *Texaco, Inc.*, 10 Cir., 283 F.2d 169; *Panhandle Eastern Pipe Line Company* v. *Isaacson*, 10 Cir., 255 F.2d 669; *McCammon* v. *Texas Company*, D.C. Kan., 137 F. Supp. 256; 2 Summers, Oil & Gas, Perm. Ed., § 302.1, pp. 293-294 and cases cited in note 98.15.

4. Cf. *Broussard* v. *Phillips Petroleum Company*, D.C. La., 160 F. Supp. 905, 907, affirmed *per curiam* on basis of opinion below, 5 Cir., 265 F.2d 221.

5. In each lease the habendum clause reads thus: "This lease shall remain in force and effect for a term of ten (10) years from the date of its delivery (hereinafter sometimes called the 'primary term') and as long thereafter as oil, gas, or other minerals are or can be produced from any well on said premises and as long as hereinafter otherwise provided in the event of consolidation."

meaning should be ascertained by consideration of all pertinent provisions rather than "by a critical analysis of a single or isolated provision"; that in the event of ambiguity or uncertainty consideration must be given to "the instrument as a whole, the object sought to be obtained, and other circumstances, if any, which tend to clarify the real purpose and intent of the parties"; and that a practical and equitable construction must be given to ambiguous terms. We must decide the cases on the basis of the instruments before us and the Kansas law.

The trial court held that the Pugh clauses were written in "surface sounding terms" and do not "specifically or clearly designate underground horizons" and concluded that the provisions of the Pugh clauses terminating the leases at the end of the primary terms as to ununitized nonproducing portions apply only to "partial unitization of less than all of the surface acreage covered by the leases." As all the surface acreage was unitized, and as there was production from each unit, the decision was that the leases were continued beyond the primary terms as to all horizons.

Admittedly, the Pugh clauses apply to vertical divisions of the leased premises. The query is whether they apply to horizontal divisions. In determining the issue we are aided by no decisions which are directly in point. *Broussard* v. *Phillips Petroleum Company*, *supra*, and *Humble Oil & Refining Co.* v. *Hutchins*, 217 Miss. 636, 64 So.2d 733; 65 So.2d 824, relied on by lessors, are not helpful as each concerned the application of a Pugh clause to a vertical rather than a horizontal division. Westhoma relies on *Martin* v. *Texas Gulf Producing Co.*, 223 Miss. 872, 79 So.2d 270, involving a lease which did not contain a Pugh clause. The court there rejected the contention that failure to drill below a horizon which had been

unitized and from which production had been obtained off the leased premises but within the unit terminated the lease. *White* v. *Frank B. Treat & Son*, 230 La. 1017, 89 So.2d 883, also cited by Westhoma, was concerned with a mineral servitude rather than a lease and held that production from a unitized zone continued the servitude as to all zones. No Kansas decisions bearing on the specific point have been brought to our attention.

Under the Pugh clauses the lessee is authorized to consolidate the leasehold estate, "or any part or parts thereof," with the mineral leasehold estate, "or parts thereof", in other lands upon which the lessee at the time has a valid lease. The consolidation is limited to include not more than 2,560 acres. The lengthy and technical arguments as to whether the word "part" is confined to vertical divisions on the basis of surface acreage or also encompasses horizontal divisions on the basis of depth can be simply resolved. The ordinary practice is to confine consolidations to a formation or pool which constitutes a known common source of supply.[6] In situations where there is more than one source or pool underlying the same land[7] a comprehensive consolidation from the surface to the center of the earth carries with it the potential of grievous complications if different geographical units are established for different producing formations.[8] The leases

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6. Hoffman, Pooling and Unitization Clauses in Oil Leases, 1 Rocky Mountain Mineral Law Institute, pp. 107-108; Summers, supra, Vol. 3, § 553.1; cf. *Carter Oil Co.* v. *McCasland*, 10 Cir., 190 F.2d 887. See 1959 Supp. to G.S. Kan. 1949, §§ 55-603 and 55-703 which respectively empower the state corporation commission to regulate the taking of oil from any pool and of gas from any common source of supply.

7. Cf. *Whitaker* v. *Texaco, Inc.*, *supra*, 283 F.2d at pages 176-177.

8. *Hoffman*, *supra*.

contain no prohibition against the recognized practice of consolidating in terms of sources of supply, pools, or depth. The parties recognize the validity of the partial assignments to Plains and Westhoma with division on the basis of depth. Plains could not consolidate the entire leasehold estate as it did not own that portion below sea level. In the situations presented it is our opinion that "part" as used in the consolidation authorization includes both horizontal and vertical divisions.

The Pugh clause lease continuation provisions are found in subparagraph 9 (a) which reads that in the event of consolidation the lease shall be continued "as to the premises covered hereby and included in any such consolidation of estates" by a producing gas well located on a consolidated unit or by oil production from a well on leased land.

Lease termination is covered by sub-paragraph 9(b) of the Pugh clause which states that the lease terminates at the expiration of the primary term as to any "tract or tracts not included in a consolidation held in force by production" unless there is production in accordance with other lease terms.

Consistency between 9(a) and 9(b) requires that "premises" as appearing in 9(a) and "tract or tracts" as appearing in 9(b) be given the same meaning. We deem it unnecessary to engage in a semantic analysis of the technical implications of the quoted terms. Definitions can be found which confine those terms to surface application and other definitions give them such generality of meaning as to include both surface and sub-surface rights. It is enough that consolidation may be on the basis of horizontal as well as vertical divisions and the consolidation here made includes only that portion of the leasehold estate which is above sea level. The portion below sea level was

not consolidated and hence is not within the purview of 9(a) and the continuation provisions of that subparagraph do not apply. By the same reasoning the termination provisions of 9(b) are applicable and term .e the leases as to the below-sea-level horizons at the e . of the primary term because there was no production therefrom during that term.

To avoid this conclusion Westhoma argues that the lease provisions for delay rentals and minimum gas royalties are stated in terms of surface acres, that the lease must be considered in its entirety, and that the inapplicability of the delay rental and minimum gas royalty provisions to horizontal divisions requires the conclusion that consolidations must likewise be treated solely from the standpoint of surface acres. As we are not concerned with delay rentals or royalties, the provisions in regard thereto are pertinent only so far as they bear on intent and for such purpose we find them without persuasive effect. Delay rentals are specifically mentioned in 9(b) and, as has been shown, that subparagraph ends the leases at the expiration of the primary term as to unconsolidated unproductive tracts. Provision for rental on an acreage basis does not mean that the parties intended lease continuation for that part of the leasehold estate which was without a consolidation and which was unproductive.

Problems relating to minimum royalties payable on an acreage basis obviously can cause complications in the event there is production from more than one horizon but those complications will occur regardless of whether the lease is divided on a horizontal basis. Granting that in hypothetical situations difficulty might arise over the rent and royalty provisions, the fact remains that bothersome lease provisions of uncertain meaning and application are

of little help in determining the meaning of other lease provisions.

Westhoma emphasizes the indivisibility of the express and implied covenants of a single oil and gas lease.[9] The liabilities of lessee and his assignee are not altered by any division which the lessee may make of his interests,[10] but that rule has no effect here. The separation of the lease into two parts with the lease continuing as to the upper horizons and terminating as to the lower horizons results from the application of lease terms. There is nothing to prevent parties from agreeing that a lease may be separated under certain conditions. The argument that the conclusion reached imposes additional requirements to keep the lease alive is unimpressive. Under the Pugh clauses if there were vertical consolidations of less than all lease acreage, there would be the additional requirement of drilling and obtaining a producing well on the unconsolidated area. The fact that the result also ensues from a horizontal consolidation does not make the Pugh clauses any less effective when there is a horizontal rather than a vertical consolidation. The same requirements apply to each.

We must arrive at the intent of the parties. The Pugh clauses are for the protection of the lessors to prevent lease continuation as to ununitized portions which are nonproducing. We find nothing in the leases which confines the application of the Pugh clauses to surface areas and vertical divisions. It is common knowledge that leases are divided both vertically and horizontally and that unitization is ordinarily on the basis of a common source of supply.

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9. Cf. *Wilson* v. *Texas Company*, 147 Kan. 449, 76 P.2d 779, 783.

10. *Summers, supra*, Vol. 3, § 512, p. 403.

While the inclusion of all surface areas in consolidations protects lessors from the hardships resulting, in the absence of a Pugh clause, from partial vertical consolidation, recognition of this fact does not solve the problem. A lease can provide for protection against continuation both of unconsolidated vertical divisions and of unconsolidated horizontal divisions. Considering these leases as a whole, we believe that a reasonable interpretation requires the conclusion that it was the intent of the parties to prohibit lease continuation as to unproductive portions without a consolidation whether such portions were the result of horizontal or vertical divisions. As the below-sea-level horizons were not included within any consolidations and as there was no production therefrom, the leases terminated as to such horizons at the end of the primary period.

In Nos. 6522 to 6548, inclusive, the judgments are severally reversed with directions to enter judgments for the plaintiffs cancelling the leases so far as below-sea-level horizons are concerned.

BRATTON, Circuit Judge (dissenting).

Section 2 in each of the several leases provides in conventional form that the lease shall remain in force and effect for a term of ten years from the date of its delivery and as long thereafter as oil, gas, or other minerals are or can be produced from any well "on said premises and as long as hereinafter provided in the event of consolidation." Section 9 expressly authorizes consolidation of the leasehold estate "or any part or parts thereof" with other leaseholds owned by the lessee. And it further provides in effect that after consolidation, the lease shall continue in force and effect so long as gas is or can be produced from any well "located on any part of the land included in such consolidation (whether on

lands covered hereby or not), except as herein otherwise provided, or so long as oil is or can be produced from any well drilled on a portion of the land covered hereby." In short, each lease provides that it shall be continued beyond the primary period by production as therein specified during such primary period.

But the leases do not speak of horizons. They make no reference in specific language to production from one horizon perpetuating or failing to perpetuate the leases in respect to another horizon. They are silent in respect to partial unitization or consolidation of horizontal structures. They say nothing concerning depths, levels or stratums. They are completely silent as to such terminology. Viewed as a whole, and given a reasonable interpretation, the leases fail to indicate persuasively that at the time of their execution, the parties lessor and lessee were thinking in terms of sub-surface separation or segregation of mineral rights by levels, horizons or stratums, in respect to production from one level or horizon failing to continue the leases beyond the primary period in respect to another level or horizon. Instead, they say in general language that production during the period shall continue their existence in force and effect beyond the termination of the primary period. They do refer to consolidation of any part or parts of the leasehold premises. But that reference is to surface separation or division by vertical segregation. It does not refer to sub-surface segregation by depth, level, stratum, or horizon. And in the absence of an express provision in the leases relating to production from one level or horizon during the primary period failing to perpetuate the leases in respect to another level or horizon, production during the primary period from a horizon above sea level had the effect of perpetuating beyond the primary period the leases in their entirety. Cf. *Martin* v.

Texas Gulf Producing Co., 223 Miss. 872, 79 So.2d 270; *White* v. *Frank B. Treat & Son*, 230 La. 1017, 89 So.2d 883.

It is my view that the judgments should be severally affirmed.

On Petition for Rehearing.

BREITENSTEIN, Circuit Judge.

With the court's permission, 28 lawyers have joined in an *amici curiae* brief supporting the appellee's petition for rehearing. Among other things, they attack the holding that the Pugh clauses were for the protection of the lessors. They point out that all of the leases in question were executed during World War II and say that the Pugh clauses were to permit the consolidation necessary to accommodate the leases to an order of the Office of Production Management limiting the availability of certain materials to gas wells drilled on a pattern of 1 to 640 acres.[1] The point is not well taken because 7 of the leases were executed before December 23, 1941, the date of that order. The parties tried the cases and presented the appeals on the basis that there were no facts distinguishing any one lease from the others. The mentioned order could not have influenced the drafting of leases issued prior thereto.

The opinion of the court is said to be a departure from the prudent-operator rule. No such departure was either intended or made. The prudent-operator rule imposes on a lessee the implied duty to do whatever in the circumstances would be reasonably expected of a prudent operator of a particular lease, having rightful regard for the interest of both the lessor and the lessee.[2] Ordinarily, the

1. Conservation Order M-68, 6 Fed. Reg. 6687.

2. *Sun Oil Company* v. *Frantz*, 10 Cir., 291 F.2d 52.

prudent-operator rule comes into play in connection with a claim of breach of the implied covenant for further development. We have no such situation here as these consolidated cases involve the question of lease termination at the expiration of the primary term. They do not involve any claimed breach of the implied covenant for further development. Counsel for Westhoma have explicitly recognized in their briefs the rule laid down in *Panhandle Eastern Pipe Line Company* v. *Isaacson*, 10 Cir., 255 F.2d 669, and *Whitaker* v. *Texaco, Inc.*, 10 Cir., 283 F.2d 169, that production from a unit which contains a part of the leasehold estate continues the entire lease beyond the primary term in the absence of countervailing lease provisions. They concede that the Pugh clauses have the effect of abrogating this rule so far as vertical divisions are concerned but they say that this result does not follow as to horizontal divisions. The holding of the court applies the Pugh clauses to both vertical and horizontal divisions and gives those clauses the effect of abrogating the Whitaker and Panhandle rule as to the entire leasehold estate.

In the case at bar if there had been no consolidation, production of oil or gas from above-sea-level horizons would have continued the lease or leases in connection with which such production was obtained as to all horizons within the vertical boundaries but the lessee would be under the obligation of the implied covenant of further development.[3] The parties agree that the continuation of

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3. In saying this we are neither overlooking nor determining the effect of lease paragraph 16 which reads: "Lessee shall be under no obligation, express or implied, to drill more than one well upon the consolidated leasehold for the production of gas, regardless of when, where, or by whom offset wells may be drilled, provided nothing herein shall prevent lessee from drilling as many wells as it may desire." This has no application to oil production or to unconsolidated portions such as the below-sea-level horizons.

the leases beyond the primary term is controlled by the Pugh clauses. By their terms these clauses operate to continue the leases beyond the primary term by gas production only as to the parts thereof within a consolidation. Diverse ownership made the consolidation of the below-sea-level horizons with above-sea-level horizons impossible.

Counsel for Westhoma insist that the opinion of the court places an unreasonable interpretation on the leases because no rational purpose can be accomplished by applying the Pugh clauses to ununitized horizontal divisions. We disagree. An important purpose of the Pugh clauses when considered in connection with vertical divisions is to prevent lease continuation beyond the primary term as to unproductive areas not included within a unit and to obviate the necessity of an action for breach of the implied covenant to develop further in order to terminate the lease as to such areas.[4] Exactly the same reason applies so far as horizontal divisions are concerned.

The amici object to the application of subsurface meaning to the word "part" and analyze the use of that word in the leases. In so doing they fail to mention paragraph 10 providing for lease assignment "in whole or in part" and disregard the fact that the parties admit the validity of the partial assignments to Plains and Westhoma on the basis of horizontal divisions.

The petition for rehearing is denied.

BRATTON, Circuit Judge, would grant the petition for rehearing and affirm the judgment.

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4. In *Whitaker* and *Sun Oil*, both *supra*, it was pointed out that lease continuation beyond the primary term resulting from production on a unit containing part of the leased premises was subject to compliance with the implied covenant to further develop. The Sun Oil case was an action to forfeit for breach of that covenant.

APPENDIX B

Letter Order of the United States District Court for the Western District of Oklahoma Denying Stay and Consolidating Cases

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

Chambers of
Stephen S. Chandler
Chief Judge

Oklahoma City 1
October 18, 1961

Fleeson, Gooing, Coulson & Kitch
901 First National Bank Building
Wichita 2, Kansas
Hemry & Hemry
1355 First National Building
Oklahoma City 2, Oklahoma
Light & Yoxall
Liberal, Kansas
Cochran, Dudley, Fowler, Rucks, Baker & Jopling
1133 First National Building
Oklahoma City, Oklahoma.

Re: 9409-9415-Civil, 9419-Civil, 9421-Civil, 9431-Civil, 9435-Civil Eva J. Baxter et al v. Westhoma Oil Company et al

Gentlemen:

Upon consideration of defendants' motions to stay, I have come to the conclusion that the motions should be, and they hereby are overruled and defendants are granted 10 days in which to answer.

The cases filed by defendants in the District Court of Texas County, Oklahoma, were instituted subsequent to the suits in this court, and it is impossible to ascertain how long it will be before a final decision will be rendered in those cases in state court. As a general rule, it takes much longer for a case to be finally decided in the state courts of this state than it does for a case to reach final decision in the federal courts sitting here. Furthermore, the defendants could have filed their suits in the courts of the State of Oklahoma any time after the cases were filed in Kansas which resulted in the decision of Rogers v. Westhoma, 291 F.2d 726, but they did not choose to do so until the instant suits were filed. Although the defendants insist that the question herein involved should be decided by a state court, the defendant Westhoma itself removed the Kansas cases to federal court from state court. Under the circumstances, it would not be fair or right for this court to stay these actions pending the outcome of the state court suits and thus enable the defendants to choose the forum when their apparent purpose, in view of Westhoma's choice of a federal forum in Kansas, is to speculate on a different decision from another court of concurrent jurisdiction. This is true particularly where the remedy in this court undoubtedly will result in a final determination in a fraction of the time necessary to obtain one in the state forum.

It is further ordered that the above captioned cases be consolidated for purposes of discovery, pre-trial and trial.

Very truly yours,

s/ Stephen S. Chandler
Stephen S. Chandler

P. S. Subsequent to the filing of the cases above mentioned, three new companies cases have been filed—J. J. French et al. v. Westhoma Oil Company et al., No. 9446-Civil, Riffe Wesley et al. v. Westhoma Oil Company et al., No. 9448-Civil, and Ostby S. Austin et al. v. Westhoma Oil Company et al., No. 9458-Civil—and they are hereby consolidated for purposes of discovery, pre-trial and trial with those cases discussed in the main body of this letter. The defendants' motions to stay in cases numbered 9446-Civil and 9448-Civil are also overruled for the reasons set forth above.

S. C.

APPENDIX C

Complaint Filed by Respondents Otto G. Lutes and Florence Lutes

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

OTTO G. LUTES and FLORENCE LUTES,
Plaintiff(s),

vs.

WESTHOMA OIL COMPANY, a Corporation, PEERLESS OIL & GAS COMPANY, a Corporation, and JAKE L. HAMON,
Defendants.

No. 9410

COMPLAINT.

Come now plaintiff(s) and for cause of action against defendants, and each of them, allege that:

1. Plaintiff(s) (are) resident(s) and citizen(s) of the State of Oklahoma.

2. Defendants Westhoma Oil Company and Peerless Oil & Gas Company are corporations organized and existing under and by virtue of the laws of the State of Delaware and are authorized to do business and are doing business in the State of Oklahoma. The principal place of business of each of said defendants is located in Denver, Colorado. The registered service agent in Oklahoma for each of said defendants is A. H. Mahnker, 735 First National Building, Oklahoma City, Oklahoma.

3. Defendant Jack L. Hamon is a citizen of the State of Texas. Said defendant maintains his residence and usual place of abode at 4738 Shadywood Lane, Dallas, Texas, and an office in the Vaughn Building, Dallas, Texas. Said defendant cannot be served with summons in the State of Oklahoma.

4. The amount in controversy, exclusive of interest and costs, is in excess of $10,000.00.

5. Plaintiff(s) (are) the owner(s) in fee and in possession of all the oil, gas and other minerals in, under and that may be produced from the following described land situated in Texas County, Oklahoma, to-wit:

> Southeast Quarter (SE/4) of Section Twenty-seven (27), Township six (6) North, Range Eighteen (18) ECM.

Such interest of the plaintiff(s) is subject to any valid and subsisting oil and gas lease or leases thereon. Plaintiff(s) is (are) in possession and charge of such property.

6. On or about the 15th day of February, 1943, plaintiffs as lessor(s), executed, to Peerless Oil and Gas Company, as lessee, an oil and gas mining lease, dated the 8th day of January, 1943, covering the lands above described. The lease was delivered to the lessee on or about the date it was executed. A true copy of such lease, which is re-

corded in the office of the County Clerk of said county in Book 233 at page 275, is marked "Exhibit A" and is attached hereto and made a part hereof.

7. Said lease provided among other things that it should remain in force for a term of ten (10) years from the date of its delivery and as long thereafter as oil, gas or other minerals are or can be produced from any well on said premises and "as long as hereinafter *otherwise* provided in the event of consolidation".

8. The lease further provided in Article 9 thereof:

"9. Lessee is expressly granted the right and privilege (which lessee may exercise at any time either before or after production has been obtained upon this premises or any premises consolidated herewith) to consolidate the leasehold estate, created by the execution and delivery of this lease, or any part or parts thereof, with the mineral leasehold estate or estates or parts thereof in any other lands upon which this lessee shall at the time own valid and subsisting lease or leases, located and situated near the property described herein, provided that any resulting consolidated estate shall not cover and include more than 2560 acres. Any consolidation of estates herein authorized shall be consummated when the owner of the leasehold estate created hereby shall have executed and filed for record in the office of the County Clerk of the county or counties in which the same or any part thereof is located, a statement designating and describing such properties so consolidated and declaring lessee's intention to consolidate same, and in the event of any such consolidation, it is agreed:

(a) This lease shall thereafter continue in full force and effect for all purposes as to the premises covered hereby and included in any such consolidation of estates, so long as gas is or can be produced from any well located on any part of the land included in such consolidation (whether on lands covered hereby

or not), except as herein otherwise provided, or so long as oil is or can be produced from any well drilled on a portion of the land covered hereby.

(b) During the primary term hereof and until production has been obtained, from this or the consolidated leasehold, the lessee shall be privileged to pay the annual delay rentals stipulated herein on any part of this leasehold included in a consolidation of estates or not so included, and thereby continue this lease in full force and effect as to the part or portions thereof upon which rentals are so paid, but this lease, insofar as it covers any tract or tracts not included in a consolidation of estates held in force by production as herein provided, shall terminate at the expiration of the primary term hereof, unless oil, gas, or other minerals is or can be produced from a well or wells thereon.

9. By virtue of mesne assignments thereof, the lease mentioned came to be owned, and is now owned, by Hugoton Plains Gas & Oil Company *as to producing horizons above sea level only*, and by the defendant Westhoma Oil Company, so far as it affects the land hereinabove described, is marked "Exhibit B" and is attached hereto and made a part hereof.

10. On the 12th day of December, 1949, the then owner or owners of the lease as to the producing horizons above sea level and other leases as to such horizons, caused to be filed in accordance with Article 9 of the lease a notice of unitization and consolidation and thereby created a consolidated gas leasehold estate consisting of gas leasehold estates in the following described lands in Texas County, Oklahoma:

All of Section Twenty-seven (27), Township Six (6) North Range Eighteen (18) ECM,

as to producing horizons above sea level only. A true copy of the notices of unitization and consolidation is marked "Exhibit C" and is attached hereto and made a part hereof.

11. By reason of the foregoing, the owners of the lease hereinbefore described have in legal effect divided that lease horizontally into two leases, one as to producing horizons above sea level only, and one as to producing horizons below sea level only.

12. The primary term of the basic lease has expired. It has been continued in force as to horizons above sea level and above sea level only by production of gas from such horizons, which production still continues.

13. There has been no production of oil from the leased land nor any production of gas from any horizon below sea level in the land described in the basic lease or from any such horizon in other land in a consolidated estate which may include horizons below sea level in the land or any part thereof described in the basic lease, and at the time of expiration of the primary term no operation was in progress for the drilling of an oil well on the leased land into any formation or for drilling into any formation below sea level for the production of gas therefrom. Therefore, and by reason of all the facts hereinbefore alleged, the lease as to all horizons below sea level has expired by its terms.

14. Defendants, and each of them, appear to have or claim some interest in the lease aforesaid as to horizons below sea level in the land described in the lease and such constitute a cloud upon the title to the above described property. Plaintiff(s) do not know the nature of such claim or interest; and defendants should be required to plead in this action and submit their claim of interest for adjudication of its validity or invalidity.

WHEREFORE, the plaintiff(s) pray that the oil and gas lease hereinbefore described be held to have expired by its terms as to all horizons below sea level in the land

described therein; that the lease as to all such horizons be cancelled and that the title of the plaintiff(s) to such horizons be quieted as against the defendants herein; and further pray for all other and proper relief.

Light & Yoxall
Liberal, Kansas

Fleeson, Gooing, Coulson & Kitch
901 First National Bank Building
Wichita, Kansas

Hemry & Hemry
1355 First National Building
Oklahoma City, Oklahoma

By /s/ Robert T. Cornwell
Attorneys for Plaintiffs

(EXHIBIT A ATTACHED TO COMPLAINT)

Oil and Gas Mining Lease

THIS AGREEMENT entered into this 8th day of January, 1943, by and between Otto George Lutes, and wife Florence Lutes, the undersigned, hereinafter called Lessor, whether one or more, and Peerless Oil and Gas Company, the undersigned, hereinafter called Lessee,

WITNESSETH:

1. That lessor for and in consideration of the sum of One and No/100 Dollars ($1.00), in hand paid, and of the covenants and agreements hereinafter contained, to be performed by lessee, have this day granted and leased, and hereby grant and lease and let unto the lessee for the purpose of mining and operating for, and producing oil, gas and casinghead gas and gasoline from the hereinafter described premises, laying pipe lines, building tanks, storing oil, building power stations, rigs, derricks, slush

pits, operating boilers, engines, stations, telephone lines and other structures and appliances to produce, transport, save, take care of and manufacture any and/or all such substances and for housing and boarding employees, the following described property situated in the State of Oklahoma, County of Texas, to-wit:

> The West half of the Southwest Quarter of Section Twenty-six (26) and the Southeast Quarter of Section Twenty-seven (27) and the East half of the Southwest Quarter of Section Twenty-seven (27) all in Township Six (6) North of Range Eighteen (18) ECM

containing 320 acres, more or less.

2. This lease shall remain in force and effect for a term of ten (10) years from the date of its delivery (hereinafter sometimes called the "primary term") and as long thereafter as oil, gas, or other minerals are or can be produced from any well on said premises and as long as hereinafter otherwise provided in the event of consolidation. * * *

9. Lessee is expressly granted the right and privilege (which lessee may exercise at any time either before or after production has been obtained upon this premises or any premises consolidated herewith) to consolidate the leasehold estate, created by the execution and delivery of this lease, or any part or parts threof, with the mineral leasehold estate or estates or parts thereof in any other lands upon which this lessee shall at the time own valid and subsisting lease or leases, located and situated near the property described herein, provided that any resulting consolidated estate shall not cover and include more than 2560 acres. Any consolidation of estates herein authorized shall be consummated when the owner of the leasehold estate created hereby shall have executed

and filed for record in the office of the County Clerk of the county or counties in which the same or any part thereof is located, a statement designating and describing such properties so consolidated and declaring lessee's intention to consolidate same, and in the event of any such consolidation, it is agreed:

(a) This lease shall thereafter continue in full force and effect and for all purposes as to the premises covered hereby and included in any such consolidation of estates, so long as gas is or can be produced from any well located on any part of the land included in such consolidation (whether on lands covered hereby or not), except as herein otherwise provided, or so long as oil is or can be produced from any well drilled on a portion of the land covered hereby.

(b) During the primary term hereof and until production has been obtained, from this or the consolidated leasehold, the lessee shall be privileged to pay the annual delay rentals stipulated herein on any part of this leasehold included in a consolidation of estates or not so included, and thereby continue this lease in full force and effect as to the part or portions thereof upon which rentals are so paid, but this lease, insofar as it covers any tract or tracts not included in a consolidation of estates held in force by production as herein provided, shall terminate at the expiration of the primary term hereof, unless oil, gas, or other minerals is or can be produced from a well or wells thereon.

* * *

10. If the estate of either party hereto is assigned (and the privilege of assigning in whole or in part, as to any part of said land, or as to only oil or only gas, is expressly allowed), the covenants hereof shall extend to the heirs, executors, administrators, successors and assigns, but no change of ownership in the land or in the rentals or royalties shall be binding on the lessee until after notice

to the lessee and it has been furnished with the written transfer or assignment of a certified copy thereof. * * *

IN WITNESS WHEREOF, We sign the day and year first above written.

/s/ Otto G. Lutes
/s/ Florence Lutes

(EXHIBIT B ATTACHED TO COMPLAINT)

Assignment of Oil and Gas Leases

KNOW ALL MEN BY THESE PRESENTS: That Vernon Taylor, Jr., of Bexar County, Texas, Ruth Taylor Campbell, of Montgomery County, Alabama, The Sara H. Taylor Trust (Vernon F. Taylor Trustee thereof) and The James C. Taylor Trust (Vernon F. Taylor Trustee thereof) hereinafter called assignors, in consideration of Ten ($10.00) Dollars and other good and valuable consideration to them passing, the receipt of which is hereby acknowledged, do hereby transfer, assign and convey unto Westhoma Oil Company, a corporation, duly incorporated and existing under the laws of the State of Delaware and having authority to do business both in the State of Oklahoma and in the State of Kansas, hereinafter called assignee, all of the assignors' right, title and interest in and to the oil and gas leases insofar as they cover the hereinafter described lands to the extent of the producing horizons which are situated *below, and only below*, sea level. Said leases are described below by reference to the dates thereof, name of lessors, name of lessees, county and state in which the property is located, description of the land, and the book and page of the recording thereof, respectively, as follows, to-wit:

REVENUE STAMPS ...0 affixed.

TEXAS COUNTY, OKLAHOMA

Date:	January 8, 1943
Lessor:	Otto G. Lutes and Florence Lutes
Lessee:	Peerless Oil and Gas Company
Description:	The West half of the Southwest Quarter of Section Twenty-six (26) and the Southeast Quarter of Section Twenty-seven (27) and the East half of the Southwest Quarter of Section Twenty-seven (27) all in Township Six (6) North of Range Eighteen (18) ECM
Recorded:	Book 233 at Page 274
Expiration:	January 8, 1953
Acreage:	320 acres
	(Together with other leases)

and being leasehold interests heretofore transferred and assigned to the assignors by Peerless Oil & Gas Company.

This transfer and assignment, however, is pursuant to the terms and provisions as set forth in a written agreement between Peerless Oil & Gas Company and these assignors dated September 20, 1944.

To have and to hold the same unto the said assignee, its successors and assigns, according to the terms and conditions of said leases.

The effective date of this instrument is January 1, 1948, at seven o'clock A.M.

Witness the hands of the assignors, this 15th day of December, 1947.

/s/ Vernon Taylor, Jr.
Vernon Taylor, Jr.

/s/ Ruth Taylor Campbell
Ruth Taylor Campbell

/s/ Vernon F. Taylor
Vernon F. Taylor, As Trustee
for the Sara H. Taylor Trust

/s/ Vernon F. Taylor
Vernon F. Taylor, As Trustee
for The James C. Taylor Trust

(EXHIBIT C OF COMPLAINT)

Declaration of Consolidation of Oil and Gas Leases

KNOW ALL MEN BY THESE PRESENTS:

THAT Plains Natural Gas Company, a Corporation, is the owner of the following described valid and subsisting oil and gas leases:

1. From Otto G. Lutes, also known as Otto George Lutes, and wife, Florence Lutes, Lessors, to Peerless Oil and Gas Company, Lessee, dated January 8, 1943, recorded in Book 233, Page 275, of the Records of Texas County, Oklahoma, covering, among other lands, the following described land in Texas County, Oklahoma:

> The Southeast Quarter (SE/4) of Section Twenty-seven (27) and the East Half of the Southwest Quarter (E/2 SW/4) of Section Twenty-seven (27), all in Township Six (6) North, Range Eighteen (18) ECM, Texas County, Oklahoma, containing 240 acres, more or less;

2. From Louis B. Carpenter and wife, Mary E. Carpenter, Lessors, to Peerless Oil and Gas Company, Lessee, dated January 7, 1943, recorded in Book 233, Page 322, of the Records of Texas County, Oklahoma, covering, among other lands, the following described land in Texas County, Oklahoma:

> The West Half (W/2) of the Southwest quarter (SW/4) of Section Twenty-seven (27), Township Six (6) North, Range Eighteen (18) ECM, Texas County, Oklahoma, containing 80 acres, more or less;

3. From Isaac H. Lutes and Mary A. Lutes, his wife, Lessors, to Frank Parkes, Lessee, dated January 7, 1937, recorded in Book 207, Page 365 of the Records of Texas County, Oklahoma, as extended by instrument dated December 22, 1942, executed by Isaac H. Lutes, recorded in Book 236, Page 55, of the Records of Texas County, Oklahoma, and as modified by instrument dated May 19, 1947, executed by Isaac H. Lutes et al., recorded in Book 267, Page 537 of said Records of Texas County, Oklahoma, covering the following described land in Texas County, Oklahoma, among other lands:

> The North Half (N/2) of Section Twenty-seven (27), Township Six (6) North, Range Eighteen (18) ECM, Texas County, Oklahoma, containing 320 acres, more or less.

Under and by virtue of the provisions of the above described leases, the undersigned is granted the privilege, for the purpose of forming a unit of not to exceed Six Hundred Forty (640) acres, of consolidating and unitizing each of said leases with any other valid and subsisting oil and gas lease or leases owned by the undersigned.

NOW, THEREFORE, in pursuance of the authority granted the undersigned under and by virtue of the pro-

visions of the above described leases the undersigned hereby consolidates and unitizes the above described leases, insofar as the same cover All of Section 27-6W-18 ECM, Texas County, Oklahoma, containing 640 acres, more or less into a single unit, for the purpose of developing and operating the same for the production of natural gas and/or other minerals.

IN WITNESS WHEREOF, the undersigned has caused the above and foregoing instrument to be executed this 30 day of November, 1949.

PLAINS NATURAL GAS COMPANY
By /s/ Vernon .....
President

(Seal)

/s/ W. B. Chapman,
Assistant Secretary

APPENDIX D

Motion of Westhoma Oil Company et al. to Stay

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

OTTO G. LUTES AND FLORENCE LUTES,
Plaintiff(s),
vs.
WESTHOMA OIL COMPANY et al.,
Defendants.

No. 9410

MOTION

The Defendants, Westhoma Oil Company, Peerless Oil and Gas Company and Jake L. Hamon, respectfully show to the Court the following:

1. As shown by the complaint on file herein, this is an action to cancel an oil and gas lease and to quiet title, as to all depths, horizons and strata below sea level, underlying certain lands located in Texas County, Oklahoma. These Defendants claim to own a valid and subsisting oil and gas lease covering all such horizons below sea level, whereas the Plaintiff(s) claim that such oil and gas lease has terminated with respect to such horizons below sea level. The essential and critical question of law to be decided is the proper interpretation and construction of the oil and gas lease involved. Federal jurisdiction rests exclusively upon diversity of citizenship.

2. Said critical question of law is a question of state law, and the same has not yet been decided by the Supreme Court of the State of Oklahoma or by any other state court.

3. Plaintiff(s) rely herein upon the decision and majority opinion of the United States Court of Appeals for the 10th Circuit in *Rogers* v. *Westhoma Oil Company*, 291 F.2d 726, wherein the Court, applying Kansas law in a diversity action involving leases on lands located in the State of Kansas, upheld Plaintiff(s)' contention under an identical factual situation and an identical lease form.

4. Two actions presently are pending in the District Court of Texas County, Oklahoma, entitled *Westhoma Oil Company* v. *Rist* and *Peerless Oil and Gas Company et al.* v. *Carpenter*, respectively numbered 10596 and 10597 on the docket of said state court. The identical question of law which is involved herein and was decided by the United States Court of Appeals for the 10th Circuit in *Rogers* v. *Westhoma Oil Company*, referred to above, is decisively in issue in said actions pending in the state court.

5. These Defendants presently are preparing to file other similar actions in the District Court of Texas County,

Oklahoma. Neither of the two pending actions, nor any of those to be filed, in said state court are, or will be, removable to this Court or to any other United States Court, since only citizens and residents of the State of Oklahoma are, or will be, Defendants therein.

6. If a judgment should be rendered against these Defendants in any of said state court actions these Defendants will appeal therefrom to the Supreme Court of the State of Oklahoma. If a judgment or judgments are rendered in any of said state court actions in favor of these Defendants, it is quite probable that the party or parties against whom such judgment or judgments are rendered will appeal therefrom to the Supreme Court of the State of Oklahoma. Thus, said critical question of state law will be authoritatively decided and determined by the highest appellate court of the State of Oklahoma, and the decision of that court will be determinative of the identical and decisive question of law involved in this diversity action.

WHEREFORE, the Defendants move the Court to stay further proceedings in this action to afford an opportunity for state court determination of a decisive issue of state law, and to abstain from proceeding further with this action until after said question has been decided by the Supreme Court of the State of Oklahoma.

Cochran, Dudley, Fowler, Rucks, Baker & Jopling
By /s/ Richard W. Fowler
Richard W. Fowler
1133 First National Building
Oklahoma City 2, Oklahoma

CERTIFICATE OF SERVICE

Copies of this Motion were mailed on September 25, 1961, to Plaintiff(s)' attorneys at their respective addresses.

/s/ Richard W. Fowler
Richard W. Fowler
Attorney for Defendants

APPENDIX E

Pretrial Order

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

EVA J. BAXTER, Plaintiff, vs. WESTHOMA OIL COMPANY et al., Defendants.	**Case No. 9409 Consolidated with Cases Numbered 9410, 9411, 9412, 9413, 9414, 9415, 9419, 9421, 9431, 9435, 9446, 9448, 9453, 9489, 9490, 9494, 9503, 9504, 9505, 9512, 9513, 9525 and 9543.**

PRETRIAL ORDER

On the 14th day of February, 1962, this matter comes on for pretrial pursuant to notice to all parties. Plaintiffs appear by and through their attorneys Jerome E. Hemry of Hemry and Hemry and Wayne Coulson and Robert T. Cornwell of Fleeson, Gooing, Coulson & Kitch. Defendants appear by and through their attorneys, Richard W. Fowler of Cochran, Dudley, Fowler, Rucks, Baker & Jopling.

Counsel for the parties announce that they have reached an agreement concerning certain factual issues and that such agreement will be reduced to writing and filed herein.

* * *

Counsel for defendants requested that the Court reconsider its previous ruling on defendants' motion to stay, and the Court took the same under advisement.

Counsel for all parties announced that the cases were ready for trial at the Court's convenience, if defendants' Motion to Stay should be overruled.

/s/ Stephen S. Chandler

Judge Chandler

Office Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 522

THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA AND THE HONORABLE STEPHEN S. CHANDLER, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, *Petitioner*

v.

OTTO G. LUTES, FLORENCE LUTES, B. B. FRENCH, JEWELL FRENCH, L. O. HOOD, MYRTLE HOOD, D. M. BROWER, MILDRED BROWER, CARL R. STALCUP, MILLIE L. STALCUP, IDA F. WRAY, E. F. BRUCE, GERALDINE BRUCE, J. J. FRENCH, THESIA FRENCH, RIFFE WESLEY, HAZEL RIFFE, OSTBY S. AUSTIN, ETHEL AUSTIN, JESSIE E. BROWN, D. L. HAMILTON, HELEN HAMILTON, HARRY G. RIFFE, MYRTLE RIFFE, G. F. PRICE, FLORA LEE PRICE, LEWIS B. CARPENTER, MARY E. CARPENTER, E. L. CARPENTER AND BLANCHE M. CARPENTER, *Respondents*

BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

PEYTON FORD
1000 Connecticut Ave.
Washington, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

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BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ARGUMENT

As is true of most respectable briefs in opposition to petitions for certiorari, the one filed by Respondents in our case bends every phrase to convince this Court that nothing of consequence has transpired below. So

much is inevitable. But in explaining the stay order herein as part of a "deliberate and calculated strategy of speculating on different decisions in different courts . . ." and in freely imputing forum-shopping motives to Petitioner,[1] Respondents have exceeded the bounds of propriety, logic and useful legal argument.

The best and briefest answer to Respondents' charge is simply that "forum-shopping" is not involved in this case. It was not found as a fact nor assigned as a ground for any decision in the record before this Court. The trial judge alluded to it neither in his denial nor later granting of Petitioner's request for a stay. Nor could any fair-minded analyst conclude that the suspicion of "forum-shopping" played any material role in the 10th Circuit's decision (notwithstanding one altogether gratuitous remark on this point in the court's opinion). In any event, even if there had been some calculated forum-shopping conspiracy, as Respondents now charge, this would not have undercut the propriety of the district judge's act of discretion in issuing a stay order.

Turning from rebuttal to attack, a few defects and misconceptions in Respondents' brief merit quick discussion.

Of central importance is the fact that Respondents nowhere address themselves to the point repeatedly emphasized earlier by Petitioner, *i.e.* that the allowable area of a trial judge's discretion was the essential

[1] Of course, the "petitioner" now before this Court is the Federal District Court for the Western District of Oklahoma, and was not involved as a party in the litigation out of which the original mandamus proceeding arose. The word "petitioner" is thus used in a double sense in the present brief and the two earlier filed before this Court.

question posed for the 10th Circuit. Respondents evidently think that nice rules are written lividly in the skies, clearly setting out what justifies a stay order and what does not. Under any such mechanistic theory of jurisprudence, there might be no "live" legal question here—nor could there be more than precious few anywhere else.

In any event, in spite of their best efforts, Respondents' brief generates significant legal questions by its very terms. At page 13, while casting oblique aspersions upon the petition, Respondents state:

"In order to make that case [*Thompson* v. *Magnolia Petroleum Corp.*] appear to apply here, the petitioners found it necessary to paraphrase the holding there in such a way as to make it directly inconsistent with the later holding of this court, specifically dealing with diversity jurisdiction, in *Meredith* v. *Winter Haven*. . . ."

To appreciate the question generated by Respondents it is first necessary to understand that there is absolutely nothing wrong with Petitioner's paraphrase of *Magnolia*. Respondents do not pinpoint the asserted defect; nor could they if they had tried. Granted that the paraphrase is accurate (and Petitioner trusts the Court to satisfy itself on this point), to describe it as "directly inconsistent" with *Meredith* can only mean that *Magnolia* has been overruled *sub silentio* or else confined in holding to bankruptcy cases. Petitioner doubts that either implication is true, but the legal question thus raised can hardly be described as trivial.

Another significant question raised by Respondents' brief is whether the federal district court involved in this case would be bound, under the *Erie-Guaranty*

doctrine, by a prior decision of the Oklahoma district court for Texas County. Petitioner submits that it would. Respondents, in footnote 2 on page 14, indicate that they feel otherwise. But Respondents neglect to add that the rather peculiar facts relied on in *King* v. *United Travelers*, the case there cited, are not present here. The Oklahoma state court here in question is one of general jurisdiction and an integral part of the state judicial system.

A word about the argument based on *Brillhart* v. *Excess Ins. Co. of America* is also in order. The argument is best brought into focus by recalling that both *Brillhart* and this case involved declaratory judgment actions in federal courts. The fact that it was a declaratory action was not considered at all by the 10th Circuit. Furthermore, the "reasons" for the stay issued here, which Respondents insist were "detailed" (Brief pp. 15-16), are far from plain upon examination of the record.

In chivvying at Petitioner's suggestion of importance in this case, Respondents argue that there is no conflict between the 10th Circuit decision and those in *Mottolese* v. *Kaufman*, 176 F. 2d 301, and *Biersdorf & Co.* v. *McGohey*, 187 F. 2d 301, two Second Circuit cases cited in the petition. Petitioner's point there was, as stated, that the "differences in tone and policy" between those decisions and the instant one were "especially marked." Petitioner stands on this statement. In *Mottolese*, Judge Hand very thoughtfully reviewed, on a mandamus action, a federal district judge's stay order, concluding that the stay lay within the judge's allowable area of discretion principally, if not solely, because the same issues were involved in contemporaneous state court proceedings. Indeed, in *Mottolese*

the questions of law were not even novel or far reaching in consequence as is true of the questions covered by the stay order issued in the instant case. Furthermore, in *President and Fellows of Harvard College*, 149 F. 2d 69 (1st Cir. 1945), a case cited in *Mottolese*, Judge Magruder in the course of a carefully reasoned opinion, views with favor the "danger of futility" argument (advanced in the petition at page 12); noting that in such instances "[w]ith this possible outcome of the [state] litigation in mind, it might well be proper for the federal district court, as an appropriate exercise of discretion, to stay the proceedings before it until the handing down by the state Supreme Court of the controlling ruling on the point of state law." 149 F. 2d 73. This is exactly what has happened here. If after a reasonable interval there is no decision by the Oklahome Supreme Court, the federal district court below will undoubtedly go forward with the adjudication.

Two other points are advanced on page 13 of Respondents' brief, although so weakly that Respondents may not expect them to be taken seriously. They assert that the 10th Circuit's opinion did not ignore "the federal policy favoring conformity in diversity cases. . . ." Petitioner had earlier contended that the court had ignored the policy favoring *uniformity of result* in diversity cases. Since an Oklahoma court of general jurisdiction has already adopted a rule of law *precisely contradictory* to the rule favored by the 10th Circuit in the instant case, Petitioner's argument seems patently correct. Respondents' rejoinder, therefore, is without merit.

Respondents also seem to cavil, albeit quite circumspectly, with Petitioner's contention that the instant case involves interests in realty. But a leasehold in-

strument does indeed concern interests in land, in Oklahoma just as in most states. *Nicholson Corp.* v. *Ferguson*, 243 P. 195 (Okla.); *Franklin* v. *Margay Oil Corp.*; 153 P. 2d 486 (Okla.). Respondents' unqualified footnote 3 on page 13 is therefore misleading.

CONCLUSION

The tack followed by the district court, Petitioner submits, was both a sound and permissible exercise of its discretion. The 10th Circuit's analysis of the stay order was singularly insensitive to the special requirements for review of a judicial act of discretion and delusively categorical in its approach to the question generally. In this Respondents have elected to follow the 10th Circuit. But error is error, from whatever quarter it emanates. And Petitioner indulges the hope that in deciding whether error has been perpetrated or significant issues have arisen in this case, this Court will not be bound by the somewhat limited perspectives of Respondents and the 10th Circuit.

Respectfully submitted,

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PETITION FOR REHEARING

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v.

OTTO G. LUTES, FLORENCE LUTES, B. B. FRENCH, JEWELL FRENCH, L. O. HOOD, MYRTLE HOOD, D. M. BROWER, MILDRED BROWER, CARL R. STALCUP, MILLIE L. STALCUP, IDA F. WRAY, E. F. BRUCE, GERALDINE BRUCE, J. J. FRENCH, THESIA FRENCH, RIFFE WESLEY, HAZEL RIFFE, OSTBY S. AUSTIN, ETHEL AUSTIN, JESSIE E. BROWN, D. L. HAMILTON, HELEN HAMILTON, HARRY G. RIFFE, MYRTLE RIFFE, G. F. PRICE, FLORA LEE PRICE, LEWIS B. CARPENTER, MARY E. CARPENTER, E. L. CARPENTER AND BLANCHE M. CARPENTER, *Respondents*

PETITION FOR REHEARING

Denial of certiorari in this case will cause unfortunate consequences which may not be readily perceptible from the papers heretofore filed. The exigencies of the case have also been sharpened somewhat by a

development occurring since the petition was denied. For these reasons Petitioner respectfully offers this petition for rehearing.

Under the mandate of the 10th Circuit the Federal District Court for the Western District of Oklahoma must now proceed to judgment with a diversity dispute turning on the construction of an unusual oil and gas leasehold instrument. The 10th Circuit, in a decision involving Kansas land, has adopted an interpretation of such instruments which, if followed in the instant case, would require judgment against the lessees. Oklahoma's substantive law, which under the *Erie-Guaranty* doctrine must control the instant litigation, has not yet developed an interpretation of such instruments. In the lone decision on point, the Oklahoma district court for Texas County, a court of original jurisdiction, has taken a position precisely opposite to that of the earlier 10th Circuit decision, a view which, if applied in the instant case, would require judgment for lessees. The decision of this state court is now docketed for review by the Oklahoma Supreme Court.

The decision by the Oklahoma Supreme Court in this case will express the state rule which must be followed by the Federal District Court in the instant case. Since the petition for certiorari in the instant case was denied by this Court, a brief has been filed in the Oklahoma Supreme Court by the lessors. The lessees' brief will be filed before the end of January. The Oklahoma Supreme Court's decision may be expected within a reasonably short time.

Unless it is altered, the 10th Circuit's mandate will now force the Federal District Court into an immedi-

ate adjudication of the case below, without the benefit of the Oklahoma Supreme Court's definitive pronouncement of the substantive law that must be followed by the Federal court. If so, there is an obvious possibility that the rule the latter chooses to christen as "Oklahoma" law will differ from the rule later enunciated by the Oklahoma Supreme Court. If this possibility materializes the upshot will be a reversal on appeal by the same 10th Circuit whose mandate now compels immediate adjudication. To hazard such a risk, with its attendant expense to litigants, seems an altogether unreasonable and unnecessary allocation of judicial energies. Why it *must* be hazarded, when the entire awkward problem could be avoided simply by awaiting the state court decision, is not easy to fathom. The state court decision will be dispositive, and it will be forthcoming fairly soon. Were it otherwise Petitioner's case would stand quite differently. As it is, both Court and litigants will be seriously disadvantaged by the ill-advised requirement of an immediate adjudication when the law to be applied has not yet been announced but is expected shortly from the authoritative state tribunal.

CONCLUSION

For these reasons, Petitioner respectfully prays that this petition for rehearing be granted and the mandate of the 10th Circuit be stayed.

Respectfully submitted,

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